

# Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse

SHELBY A.D. MOORE\*  
JEANETTE SCHAEFER\*\*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	506
II.	AN ASSESSMENT OF THE PROBLEM .....	516
	A. <i>Vulnerability of the Aging Population</i> .....	516
	B. <i>Protection of the Elderly Under Current Law</i> .....	521
	1. <i>Protective Services</i> .....	521
	2. <i>Civil Law</i> .....	523
	3. <i>Criminal Law</i> .....	525
	4. <i>Criminal Sentencing Enhancement Statutes</i> .....	527
	5. <i>Restitution</i> .....	531
	C. <i>A Need for Uniform and Strict Laws Against Abuse</i> .....	532
III.	MEANS OF FINANCIALLY ABUSING THE ELDERLY AND THE GOVERNMENT'S RESPONSE .....	532
	A. <i>"Fright Mail"</i> .....	533
	B. <i>Exploitation</i> .....	537
	C. <i>Mail Fraud</i> .....	541

---

\* Professor of Law, South Texas College of Law. LL.M., Harvard Law School, 1992; J.D., University of Baltimore, 1984; B.A., Towson State University, 1981; Attorney, Legal Services to the Elderly, August 1985–August 1986.

\*\* Practicing attorney in Austin, Texas specializing in Elder Law. J.D., South Texas College of Law, 1999. We are grateful for the critical reading of and suggestions from Professor Helen B. Jenkins and Professor Kevin Yamamoto. We also thank research assistant Jessica McAleer for all of her hard work and law librarian Monica Ortale for always being willing to locate sources at a moment's notice.

D.	Telemarketing Fraud .....	543
E.	Fraudulent Charity Solicitation .....	548
F.	Mooch Lists .....	549
IV.	PROPOSED SOLUTIONS .....	551
V.	CONCLUSION .....	555
VI.	APPENDIX .....	557

## I. INTRODUCTION

Faye Shelby received a frightening letter warning that the Social Security system was on the verge of collapse and begging her for a donation to help rescue it from ruin. She sent \$75 and soon was besieged with a flood of letters, all seeking money from her.<sup>1</sup> Mary Ann Downs received a phone call that promised a “valuable” prize. In order to claim the prize, however, she would have to purchase cosmetics valued at over \$200. Anticipating the prize, she purchased the cosmetics only to be told that while the prize was still hers, she would have to make another purchase. She followed the bait, eventually losing \$74,000, never receiving the prize.<sup>2</sup> Ruth Crosson was the victim of a “Ponzi scheme” that offered her the “opportunity” to invest in a low risk, high pay investment. She borrowed \$100,000 to invest and lost it all.<sup>3</sup>

People of all ages fall for such schemes. Some would argue that the

---

1. Diana Walsh, “Fright Mail” *Fund-Raisers, Targeting Elderly with Scare Tactics?* *The Fear Merchants*, S.F. EXAMINER, Feb. 8, 1998, at A1. “A child of the Depression, Shelby spends almost nothing on herself. She is a self-described ‘cheerful giver,’ donating to her church, the Red Cross and veterans groups. She says she responded to the barrage of fright mailings because she felt she had no choice.” *Id.*

2. See George J. Church, *Elderscam: Reach Out and Bilk Someone*, TIME, Aug. 25, 1997, at 54, available at 1997 WL 13375646. Downs was a former real estate saleswoman and widow of a judge. However, when her ordeal started, she was seventy-seven, recently widowed, recently diagnosed with breast cancer, and lonely. “Right there is a combination that screams ‘victim.’” *Id.*

3. *Id.* at 55. Seniors such as Ruth Crosson have some money from Social Security, savings, or life insurance from a late spouse. Their desire never to become a burden to their children makes them easy prey for phony investment schemes. *Id.*; see also RICHARD L. DOUGLASS, DOMESTIC MISTREATMENT OF THE ELDERLY—TOWARD PREVENTION 9 (1995). Douglass notes that most authorities agree that greed is the primary cause of financial abuse or exploitation. *Id.* Stealing or mismanaging an elder person’s resources is clearly motivated behavior. *Id.* Older people do not have to be wealthy to be financially victimized; however, evidence suggests that the elderly who are affluent are more likely to be exploited. *Id.* A number of cases in literature indicate that whether victims are affluent or marginally poor, their resources are stolen or used for the benefit of others. *Id.* In addition to being exploited, less affluent victims are also more likely to be psychologically or physically abused. *Id.*; see also Johnny Coker & Bobby Little, *Investing in the Future: Protecting the Elderly from Financial Abuse*, FBI L. ENFORCEMENT BULL., Dec. 1997, at 1, 3 (noting that the scant research indicates that over sixty percent of abuse victims are likely to be elderly white females over the age of seventy).

victims are simply naive and should learn a lesson from the experience.<sup>4</sup> However, Shelby, Downs, and Crosson were between seventy-five and eighty-six years of age, and each was targeted for what is known as financial abuse.<sup>5</sup> When the elderly suffer financial victimization, they can lose their life savings or even the very funds they need for daily living.<sup>6</sup> There is also a financial loss to society when senior citizens no longer have money to invest legitimately, depriving the state of the taxes they would normally pay on those investments.<sup>7</sup> Far worse, the perpetrators

---

4. See *Use of Mass Mail to Defraud Consumers: Hearing Before the U.S. Senate Subcomm. on International Security, Proliferation and Federal Services, Comm. on Governmental Affairs*, 105th Cong. 62 (1998) (remarks of Attorney General Bob Butterworth) [hereinafter *Mass Mail*]. “These are people who could be our neighbors, our parents, our grandparents . . . good people who fell victim to companies that have sacrificed decency and ethics on the altar of the bottom line.” *Id.*

5. DOUGLASS, *supra* note 3, at 4. Dr. Douglass defines material or financial abuse as the following: “The illegal, or unethical exploitation and/or use of funds, property, or other assets belonging to the older person.” *Id.* Unfortunately, the definitions for financial elder abuse vary, causing confusion and a lack of understanding as to the different forms of abuse. See A. Paul Blunt, *Financial Exploitation: The Best Kept Secret of Elder Abuse*, AGING MAG., 1996, at 62–63; Margaret F. Hudson, *Analyses of the Concepts of Elder Mistreatment: Abuse and Neglect*, 1 J. ELDER ABUSE & NEGLECT 5, 7–14 (1989); Jerry A. Hyman, *From the Frontlines: Financial Abuse and Legal Assistance*, NARCEA EXCHANGE (Nat’l Center on Elder Abuse, Dover, Auburn, 1990); Ida M. Johnson, *Family Members’ Perspective of and Attitudes Toward Elder Abuse*, 76 FAMS. SOC’Y 220, 220–22 (1995).

6. See Patrick E. Michela, Comment, “You May Have Already Won . . .”: *Telemarketing Fraud and the Need for a Federal Legislative Solution*, 21 PEPP. L. REV. 553, 575 (1994). A ninety-year-old widow’s assets plummeted from over \$800,000 to about \$40,000 from investments with a financial group that promised profits up to \$1,000,000. *Id.* at 553–54. She testified before a congressional subcommittee that they took advantage of her loneliness by constantly calling her on the phone and talking to her about her need for financial security, which they promised to achieve for her by their “hot investments.” *Id.* at 554.

Bratkiewicz notes the following:

The emerging legislative and educational response to the impact of telemarketing fraud on seniors has been precipitated by the realization that Americans can not afford to have the elderly lose their life savings. Because senior citizens typically rely on unearned income for maintenance and support, there is no way for them to earn back the money they lose to telemarketing schemes. By draining the elderly victim’s financial resources, fraudulent telemarketers are effectively forcing the victim to become reliant on social welfare programs. Thus, the elderly do not shoulder the economic burden caused by telemarketing fraud alone; rather, this burden is shifted on to all of society.

Jeffrey L. Bratkiewicz, “Here’s a Quarter, Call Someone Who Cares”; *Who Is Answering the Elderly’s Call for Protection from Telemarketing Fraud?*, 45 S.D. L. REV. 586, 592 (2000).

7. Michela, *supra* note 6, at 574.

of these scams usually do not pay taxes on the money they have stolen.<sup>8</sup>

There is nothing new about fraudulently taking money from people, particularly the elderly. The elderly population is rapidly increasing, however, and is readily accessible by telephone and mail. As a result, the elderly are easy targets for financial abuse. Such abuse can emanate from several sources, including people the victims know and trust, particularly family and friends.<sup>9</sup> Perpetrators can be people upon whom the elderly depend for care. Abuse can also come from strangers with whom elderly victims have no direct contact.<sup>10</sup> This Article focuses primarily on the financial abuse of the elderly by strangers.

Telemarketing, mail, and charity solicitations are all potential means of fraud by strangers. As demonstrated by previous examples, solicitors ask victims to send money to purchase products, win prizes, or support worthy causes. The abuse occurs in three phases. It initially begins when a victim responds to fraudulent claims by sending money. The abuse continues when the victim's name is placed on a list of "easy targets" who will be contacted repeatedly.<sup>11</sup> The final abusive act occurs when the lists, known as "mooch lists," are sold to other potential abusers, culminating in an expanded web of abuse.<sup>12</sup>

Financial abuse of the elderly is hidden and insidious.<sup>13</sup> Those who fraudulently jeopardize the life savings of the elderly are reprehensible

---

8. *Id.*

9. See SPECIAL COMM. ON AGING, 98TH CONG., CONSUMER FRAUDS AND ELDERLY PERSONS: A GROWING PROBLEM 12 (Comm. Print 1983) ("*Abuse of trust* schemes involve the exploitation of a position of authority and/or trust such as misuse of funds by bankers, trustees, relatives, or attorneys, who may control an older person's funds."); see also DOUGLASS, *supra* note 3, at 2-3; Candace J. Heisler & Jane E. Tewksbury, *Fiduciary Abuse of the Elderly: A Prosecutor's Perspective*, 3 J. ELDERLY ABUSE & NEGLECT 23, 26 (1991) (noting that friend and family abusers are often financially dependent on the victim).

10. See Michela, *supra* note 6, at 574 (noting the elderly are targeted because they are easily accessible by phone, at home during the day, intent on enlarging their nest eggs for themselves and their grandchildren, their memories are poor, and, most notably, once they recognize the deceit, they are too embarrassed to relay the events to local law enforcement).

11. See Bob Trebilcock, *Robbed by Phone*, GOOD HOUSEKEEPING, Jan. 1, 1998, at 88, 89, available at 1998 WL 9927973.

12. See Church, *supra* note 2, at 54. "[P]rices rang[e] from \$10 for an untested 'lead' to \$200 for the name of someone who has fallen for a whole series of scams." *Id.* For a detailed discussion of the process telemarketers used to abuse the elderly, see Bratkiewicz, *supra* note 6, at 590-92.

13. Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203, 214 (2000). "The American model of rugged individualists controlling their own financial affairs has left us with a breeding ground for abuse by the unscrupulous. In general, we answer to no one about our financial dealings, so no one is examining our financial condition." *Id.*; see also Tracy Wilson, *Seeking Eyes and Ears: Seniors' Reluctance to Report Abuse Makes Community Awareness Essential*, L.A. TIMES, Aug. 10, 1998, at B1.

and should be punished.<sup>14</sup> Targeting particularly vulnerable people renders the perpetrator's conduct even more criminally depraved.<sup>15</sup> Unfortunately, however, recent studies indicate that such abuse is pervasive.<sup>16</sup> With the use of mail and telephone, potential abusers almost always have readily available victims. And with the aid of mooch lists, victimizers are generally unseen, multiple, and elusive.

Physical and psychological abuse of the elderly is similar to financial abuse in a number of ways. Elderly abuse is often difficult to detect "because the victim is frequently reluctant to report the abuse."<sup>17</sup> A victim may be ashamed to admit that she is experiencing any sort of abuse.<sup>18</sup> The victim may be afraid of her abuser and may fear retaliation if she reports the behavior.<sup>19</sup> She may not know where to find help.<sup>20</sup>

---

14. *Parsons v. First Investors Corp.*, 122 F.3d 525, 530 (8th Cir. 1997). In this case, the Eighth Circuit affirmed a large punitive award against an experienced financial investor who took advantage of an elderly retired couple and deprived them of their life savings. *Id.*

15. *See United States v. Paige*, 923 F.2d 112, 113 (8th Cir. 1991).

16. Beletshachew Shiferaw et al., *The Investigation and Outcome of Reported Cases of Elder Abuse: The Forsyth County Aging Study*, 34 GERONTOLOGIST 123, 124-25 (1994). This relatively recent study of various forms of elder abuse that occurred in Forsyth County, North Carolina, found financial abuse to be the most prevalent form, accounting for forty-six percent of the total abuse cases. *Id.*; *see also* Bratkiewicz, *supra* note 6, at 590-91 & n.42 (noting that the types of scams telemarketers use to defraud the elderly are too numerous to list); Coker & Little, *supra* note 3, at 1 (noting that recent academic research confirms the existence of significant amounts of financial abuse against the elderly). There are, however, a small number of schemes that have been identified as the most common: "(1) prize promotions, (2) advance-fee loan or credit-repair schemes, (3) magazine schemes, (4) investment schemes, (5) foreign lotteries, (6) travel schemes, and (7) office supply schemes." *Id.* at 590-91 (footnotes omitted); *see also* Jeffrey Hines, *Telemarketing Fraud upon the Elderly: Minimizing Its Effects Through Legislation, Law Enforcement and Education*, 12 ALB. L.J. SCI. & TECH. 839, 845-46 (2002); Sarah Reznick, *Fraudulent Telemarketing: Crime and Punishment*, 77 MICH. B.J. 1210, 1210-12 (1998).

17. Dessin, *supra* note 13, at 210 (indicating the general belief that abuse of the elderly is grossly underreported); *see also* Audrey S. Garfield, Note, *Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California*, 42 HASTINGS L.J. 859, 864-65 (1991).

18. Dessin, *supra* note 13, at 211 (noting that "[i]t is not difficult to imagine the loss of personal dignity" that accompanies abuse as well as the pain in having to relate the abuse to others); *see also* Hines, *supra* note 16, at 842; Suzanne J. Levitt & Rebecca J. O'Neill, *A Call for a Functional Multidisciplinary Approach to Intervention in Cases of Elder Abuse, Neglect, and Exploitation: One Legal Clinic's Experience*, 5 ELDER L.J. 195, 200 (1997).

19. Dessin, *supra* note 13, at 212 ("[T]he more abusive the relationship, the less likely it is that the abuse will be reported."); *see also* Marlowe Churchill, *Experts Stress Need to Protect Elderly from Fraud, Abuse*, PRESS-ENTERPRISE, July 1, 1998, at B2 (stating that elderly victims do not report abuse, fearing they will experience greater

Ultimately, she “may be too impaired to report the abuse, or, in some cases, to even realize that [she] is being abused.”<sup>21</sup> However, the circumstances surrounding financial abuse are further complicated because “unlike the bruises that often accompany physical abuse, the signs of financial abuse may not be so obvious.”<sup>22</sup> Elderly victims are more likely to report physical abuse, believing that bodily injury is more threatening than any material losses they suffer.<sup>23</sup> Further, many senior citizens are embarrassed about being financially victimized,<sup>24</sup> and there

---

abuse or neglect).

20. See Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77, 100 (1998); see also Dessin, *supra* note 13, at 212 (indicating that not only might the elderly view available adult protective services as “an impenetrable mass,” but even if they know whom to contact, they “may not have the mobility to go to someone who can help and may not have access to a telephone to call for help”).

21. Dessin, *supra* note 13, at 212; see also Churchill, *supra* note 19. Compare Richard A. Starnes, *Consumer Fraud and the Elderly: The Need for a Uniform System of Enforcement and Increased Civil and Criminal Penalties*, 4 ELDER L.J. 201, 205 (1996) (noting that because the elderly are members of a more trusting generation, they are more likely to accept the representations of telemarketers, making it hard for older citizens to recognize when they are being swindled), and Hines, *supra* note 16, at 841, with Trent M. Murch, *Revamping the Phantom Protections for the Vulnerable Elderly: Section 3A1.1(b), New Hope for Old Victims*, 6 ELDER L.J. 49, 54–55 (1998) (challenging the notion that the elderly are more often victimized by fraudulent telemarketing due to their frailty or declining capacities). Rather, the American Association of Retired Persons (AARP) suggests that anyone can be victimized by telemarketers, regardless of age. Bratkiewicz, *supra* note 6, at 590. In fact, the AARP conducted research which demonstrates that most elderly victims are well-educated, affluent, and socially active. Murch, *supra*, at 55. Further, only twenty-eight percent of the fraud victims live alone. *Id.* Eighty percent of the victims of telemarketing fraud had family living nearby. *Id.*; see also Mark Allan Baginskis, *Telemarketing Fraud upon the Elderly Shows No Signs of Slowing*, 11 LOY. CONSUMER L. REV. 4, 7 (citing PRINCETON SURVEY RESEARCH ASSOCS., *TELEMARKETING FRAUD AND OLDER AMERICANS*, AN AARP SURVEY 9 (1996)).

22. Coker & Little, *supra* note 3, at 1–2; see also Dessin, *supra* note 13, at 214 (asserting that an attribute distinguishing financial abuse from psychological and physical abuse is the difficulty in detecting financial abuse); Moskowitz, *supra* note 20, at 79.

23. See Coker & Little, *supra* note 3, at 1; Dessin, *supra* note 13, at 214. With physical abuse,

[a] broken bone or a bruise is frequently noticeable by even a casual observer. Psychological abuse seems less likely to produce visible signs likely to be observed by a third party. Even with this type of abuse, however, there may be changes in personality that could be observed by a person outside the abusive relationship.

*Id.*

24. Dessin, *supra* note 13, at 214; see also Michela, *supra* note 6, at 574–75. The reluctance to report financial abuse is a boon to the perpetrator not only because it hampers efforts to enforce the law, but also because underreporting results in the devotion of fewer federal and state resources to eliminating the problem. *Id.* at 575; see also Dessin, *supra* note 13, at 214. While people are inclined to brag about finding a bargain, they are far less likely to admit having paid an inflated price. *Id.* Therefore, people may be similarly reluctant to discuss a situation where they may have been financially abused. *Id.*; see Hebe R. Smythe, Note, *Fighting Telemarketing Scams*, 17

are rarely witnesses to report it.<sup>25</sup> Sometimes the elderly simply do not realize that anything is amiss.<sup>26</sup> Police officers and financial institutions are unlikely to recognize or understand financial abuse,<sup>27</sup> leaving the abused undetected and the abusers unapprehended.<sup>28</sup> Even if the elderly

---

HASTINGS COMM. & ENT. L.J. 347, 367 (1994) (noting that feelings of guilt and foolishness prevent consumers from reporting fraud in the first place); see also Bratkiewicz, *supra* note 6, at 590 (indicating that there is no debating how painful telemarketing fraud can be to its older victims). The adverse psychological impact is particularly intense when sweepstakes or phony investment schemes are used on them. *Id.* Ultimately, when elderly victims realized they have been tricked, they feel a sense of shame and betrayal, which are exacerbated by their intentions to use the scammer's offers as a tool for maintaining financial independence. *Id.*

25. See Church, *supra* note 2, at 57 ("Often there are no witnesses to a phone con except the scammer and the victim."). Furthermore, if such a con artist is convicted, the typical prison term is only one to three years. *Id.*

26. See Coker & Little, *supra* note 3, at 1; Jane Glenn Hass, *Seminars Teach Seniors to Stay a Step Ahead of Financial Fraud*, ORANGE COUNTY REG., Oct. 25, 1998, at B6; see also *Consumer Fraud Prevention Act of 1995, Hearing Before the House Comm. on the Judiciary, Subcomm. on Crime*, 104th Cong. 95 (1996) (statement of John F. Barker, Vice President, National Consumers League; Director, National Fraud Information Center) [hereinafter *Consumer Fraud*]. Barker states that senior citizens must be convinced "that the person on the other end of the phone . . . is not just a clever con artist, but a crook." *Id.* Also, families must be provided "with the tools to understand and work together to deal with the behavioral patterns [of the elderly] which contribute to vulnerability." *Id.*

27. See Heisler & Tewksbury, *supra* note 9, at 29. Law Enforcement Officials and financial institutions have some clues to suspected financial abuse of the elderly. Some indicators include the following:

- (1) [U]nusual activity in a bank account, including bank activity inconsistent with the victim's ability, e.g., bedridden senior making automatic teller machine (ATM) withdrawals;
- (2) recent, new acquaintances expressing affection for or residing with an elder who has assets;
- (3) lack of amenities when the victim can afford such items, disconnected utilities, and/or eviction notices;
- (4) new authorized signer on credit cards or unusual activity on credit card accounts, especially if the purchases are not for the victim or occur when the senior is confused or incompetent;
- (5) forged or suspicious signatures on documents when the elder cannot write . . .

*Id.* It should be noted that many of these indicators focus on abuse by relatives and do not begin to address material abuse of the elderly by strangers.

28. See, e.g., Coker & Little, *supra* note 3, at 2. The Louisiana Sheriff's Department instituted an Adopt-a-Senior Program. *Id.* at 4. Deputies are encouraged to adopt at least two senior citizens in their jurisdictions and visit them regularly to check on their welfare. *Id.* As part of their responsibilities, the deputies inquire as to any unusual mail, telephone calls, visits, or solicitations the seniors may have received. *Id.*; see also Betsy Cantrell, *Triad: Reducing Criminal Victimization of the Elderly*, FBI L. ENFORCEMENT BULL., Feb. 1994, at 19, 20-23. Local police and sheriff's departments form cooperatives with senior citizens to prevent the victimization of the elderly in the community; these programs are known as triads. *Id.* at 19. The three groups share ideas and resources to provide programs and training for vulnerable citizens who are often

were inclined to report financial abuse, there is presently no national reporting center or database designed to compile and analyze the reported cases.<sup>29</sup> As a result, no one can accurately estimate the number or types of financial abuse or its devastating impact on the elderly.<sup>30</sup>

Some lawmakers and enforcement agencies have been creative in fighting financial abuse.<sup>31</sup> However, while both federal and state laws offer innovative and workable solutions, the laws vary widely, leaving gaps through which creative abusers can escape. Commentators and scholars have addressed this matter and suggest that a national system of comprehensive, uniform laws would not only punish offenders, but would also keep them from finding a safe jurisdiction in which to operate.<sup>32</sup>

The U.S. Supreme Court has held that the state has an interest in protecting vulnerable groups from abuse, including the elderly.<sup>33</sup> However, in order for there to be effective laws to protect the elderly

---

fearful. *Id.* The programs are “most successful when a cooperative spirit exists between the involved law enforcement agencies and when seniors volunteer their time and expertise” and when the groups are properly trained. *Id.*

29. See Coker & Little, *supra* note 3, at 1; see also Janet Beighle French, *On the Trail of Fraud by Telephone*, PLAIN DEALER, July 26, 1998, at 1J. But see Hines, *supra* note 16, at 857 (indicating that the National Consumers League has established a hotline where consumers can report incidents of fraud).

30. See French, *supra* note 29; see also Kathleen H. Wilber & Sandra L. Reynolds, *Introducing a Framework for Defining Financial Abuse of the Elderly*, 8 J. ELDER ABUSE & NEGLECT 61, 62–63 (1996). Detection and investigation of financial abuse may interfere with legally guaranteed rights of adults to direct their own finances. *Id.* at 63. The authors offer a framework that can be applied to suspected abuse situations to determine whether financial abuse has occurred. *Id.* at 62. The framework includes four criteria:

1. Characteristics of the older person that suggest vulnerability to abuse.
2. The nature of the relationship between the older person and the suspected wrongdoer.
3. The reasonableness and comparative costs and benefits of the transaction(s) to the older person and the party suspected of abuse.
4. The nature of the influence used to obtain the elder’s participation in the transaction(s).

*Id.* at 64; see Bratkiewicz, *supra* note 6, at 597 (indicating that education of the elderly is the best way to prevent financial abuse, primarily because it “respects the senior’s autonomy and decision-making ability”).

31. See DOUGLASS, *supra* note 3, at 9; Coker & Little, *supra* note 3, at 3.

32. See Starnes, *supra* note 21, at 222; see also Michela, *supra* note 6, at 614–15. Uniform definitions in state and federal telemarketing laws would allow the sharing of information and evidence concerning violations of the law. *Id.*; see also Starnes, *supra* note 21, at 212. Though the elderly may be protected against fraud by general consumer protection laws, specific types of fraud against the elderly, such as telemarketing, may be tailored to avoid violating those statutes. *Id.*

33. *Washington v. Glucksberg*, 521 U.S. 702, 731–32 (1997) (upholding Washington’s state statute banning assisted suicide and indicating that the state has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes).



from financial abuse, there must be a collective effort to develop uniform policies that consider the unique plight of elderly citizens. These policies must encompass a recognition that the elderly constitute a significant and identifiable segment of the population who are subject to risks of abuse and are in need of special attention.<sup>34</sup> By virtue of age limitations and other disabilities, they are often vulnerable to abuse, whether physical, mental, or financial, and may not be capable of seeking help or protection.<sup>35</sup> To fashion protective rules for the elderly, it is critical to nationally recognize the following: The elderly are a disadvantaged class; in cases of abuse, the perpetrators are seldom prosecuted; due to problems of proof and court delays, only a small number of civil cases are brought in connection with financial abuse; and, the lack of incentives for prosecutors to pursue these types of cases serves to perpetuate this cycle of abuse against the elderly.<sup>36</sup>

The goal of this Article is to encourage legislators to strengthen the laws against all types of elder abuse, particularly financial abuse. Sample laws in various states demonstrate the different levels of protection and flexibility in current legislation. While the authors recognize the pervasiveness of physical and emotional abuse, the primary focus of this Article is the financial abuse of the elderly from telemarketers or similar sources where the abusers recognize the particular vulnerabilities of the elderly and seek to exploit them fully.<sup>37</sup> Part II explores why the elderly are

---

34. The New York Task Force warned against legalizing physician-assisted suicide because it would present profound risks to many in our society who are ill and vulnerable. The Court also noted that “[t]he risk of harm is greatest for the many individuals in our society whose autonomy and well-being are already compromised by poverty, lack of access to good medical care, advanced age, or membership in a stigmatized group.” *Id.* at 732 (citing NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT 77–82 (1994)). While the task force expressed this sentiment in the context of physician-assisted suicide, it is no less pertinent when applied to protecting the elderly, who are targeted for financial abuse because of vulnerabilities attendant with age.

35. *See id.*

36. *See id.*

37. Physical and emotional abuse of the elderly is beyond the scope of this Article. It is important to note, however, that while both types of abuse have received greater societal recognition, neither has garnered the type of attention necessary to protect the elderly from this type of abuse, which could lead to death or serious bodily injury. For example, physical injury to another is a crime in all states. Yet protection varies depending on whether the statute follows the common law, the Model Penal Code, or a variation of either. Common law uses the term “battery” to include both bodily injury and offensive touching. *See* WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 7.15, at 685 (2d ed. 1986) (defining battery as the unlawful application of force to

the person of another). The Model Penal Code uses the term “assault” to include behavior that actually causes injury and includes attempts and threats of imminent bodily injury, but omits offensive touching. See MODEL PENAL CODE § 211.1 (1985) (indicating that these acts are punished as a misdemeanor). More serious injury is covered under *aggravated* assault and is a second-degree felony. *Id.*; see also *York v. State*, 833 S.W.2d 734, 736 (Tex. App. 1992) (noting that the definition of bodily injury is broad and encompasses even relatively minor physical contacts); *infra* Appendix & Comparison Table.

Other states protect the elderly by enhancing punishments in existing statutes or creating statutes specifically designed to protect them. Texas and California, for example, do both. Texas’s assault statute includes an enhancement clause for crimes of offensive physical contact if the victim is sixty-five or older. A separate criminal statute addresses crimes that result in actual injury. See TEX. PENAL CODE ANN. § 22.01(c) (Vernon 2003). The 1995 amendment increases the punishment from a class C misdemeanor that carries a fine of \$500 for ordinary victims, *id.* § 12.23, to a class A misdemeanor that carries a fine of up to \$4000, confinement in jail up to one year, or both. *Id.* § 12.21; see also *id.* § 22.04(a)–(e); *id.* §§ 22.02, 12.32.35. Under these statutes:

- (1) An intentional act causing serious bodily or mental injury to elderly victims is a first-degree felony, *id.* § 22.04, which carries a sentence of five to ninety-nine years in prison and a possible fine of up to \$10,000. *Id.* § 12.32. Such injury against other victims would be a second-degree felony. *Id.* § 22.02.
- (2) A reckless act causing serious bodily or mental injury to an elderly victim is a second-degree felony, *id.* § 22.04, which carries a sentence of two to twenty years in prison and a possible fine of up to \$10,000. *Id.* § 12.33. Such injury against other victims would also be a second-degree felony. *Id.* § 22.02.
- (3) Intentional “bodily injury” to elderly victims is a third degree felony, *id.* § 22.04, which is punishable by a prison term from two and ten years and a possible fine of up to \$10,000. *Id.* § 12.34.
- (4) If “bodily injury” is committed recklessly, it is a jail felony, *id.* § 22.04, which is a jail term from 180 days to two years with a possible fine of up to \$10,000. *Id.* § 22.04. Intentional or reckless bodily injury against other victims is a class A misdemeanor, *id.* § 22.01(b), which carries a fine of up to \$4,000 and a jail term of up to one year. *Id.* § 12.21.

A California statute includes additional sentence enhancement for repeat offenders who victimize citizens sixty-five or older. A separate statute protects the elderly from intentional acts that inflict physical pain or mental suffering. See CAL. PENAL CODE § 667.9 (West Supp. 2003) (indicating a court can enhance a sentence by two years if the perpetrator is a repeat offender and the victim is sixty-five or older, and including robbery, kidnapping, sexual crimes, mayhem, carjacking, and burglary); see also *id.* § 368. Acts committed under circumstances likely to produce great bodily harm or death are punishable by imprisonment from one to four years. *Id.* Acts committed under less grave circumstances are punished as a misdemeanor. *Id.* At present, there are no uniform statutes that would protect the elderly from physical abuse. Statutes similar to those enacted in California that enhance all criminal sentences would provide the elderly with additional protection. Tough, uniform laws enacted in every state would establish a unified public policy indicating that society will not tolerate such acts.

In addition to physical abuse, the elderly suffer mental and emotional abuse. Such abuse can have a devastating impact on the elderly, sometimes pushing a victim to insanity or suicide. Robert A. Polisky, *Criminalizing Physical and Emotional Elder Abuse*, 3 ELDER L.J. 377, 378 (1995). States generally address psychological abuse in their protective services statutes. Statutes vary, however, in the people they protect, whether or not they must live in an institution, and the measures taken to protect them. Indeed, fewer states criminalize emotional abuse, and criminal statutes must be carefully drafted to withstand constitutional attacks.

While this sort of abuse is not uncommon, only a few states, including Delaware,

particularly susceptible to this type of abuse and compares various protections available under current laws, which include laws providing protective services, civil law, criminal law, and criminal sentencing enhancement statutes. Part III begins with a discussion of the different types of financial abuse and explores current federal and state law as well as innovative programs designed to combat such abuse. Part IV suggests how a fully comprehensive system of strict laws could protect the elderly by criminalizing all forms of abuse, giving enough flexibility to allow both criminal and civil penalties, and providing restitution to aid the victims. It also suggests that for purposes of consistency, all laws protecting the elderly from abuse should either be listed or referenced in one central location in the code rather than scattered throughout the code. Part IV also looks at some of the present proposals, both on the federal and state level, and concludes that many of the present solutions have not been effective. We must continue to strive to close the existing gaps in criminal and civil laws to afford greater protection to the elderly. The concluding Appendix and Comparison Table give a comparison of laws in all states.

---

criminalize emotional abuse. *See Robinson v. State*, 600 A.2d 356, 358 (Del. 1991) (affirming the defendant housekeeper's emotional abuse guilty conviction where the defendant shouted derogatory remarks at an eighty-five year old nursing home resident for fifteen minutes, pretended to spit on the resident, shook her rear-end in her face, and placed a flower pot on her head, all while the defendant and two other housekeepers laughed derisively); *see also* DEL. CODE ANN. tit. 31, §§ 3901–13 (1997); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (holding that the state's interest in protecting the "well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society") (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)). The statute broadly defines emotional abuse as a pattern of abuse that encompasses ridiculing or demeaning an infirm adult, making derogatory remarks to an infirm adult, or cursing or threatening to inflict physical or emotional harm on an infirm adult, making it a class A misdemeanor. DEL. CODE ANN. tit. 31, § 3902(16). The statute provides strong protection for the elderly because it criminalizes an act solely because of its abusive nature rather than its impact on the victim, both relieving the prosecutor from having to prove emotional injury to the victim and from having to place the elderly victim on the stand. Also, the elderly victim does not have to live in a care facility; any abusive person falls within the grasp of the statute, and the prosecutor has greater discretion in sentencing. *Id.* §§ 3902(1), 3902(16), 3913.

As more elderly people require in-home or institutional care, the need for protection from emotional abuse becomes greater. The Delaware statute provides a strong example that all other states should enact to protect elderly citizens. Protection should not be afforded to the fortunate few who happen to live in states that value the contributions of the elderly and that have genuine concern for their quality of life.

## II. AN ASSESSMENT OF THE PROBLEM

Senior citizens presently face two major problems. Not only is the aging population growing rapidly, but schemers recognize their vulnerability and readily victimize them. Public policy dictates that society should protect all of its vulnerable citizens, particularly the elderly. It is simply common sense to recognize that we may all face the same problems as we grow older if we do not remedy them now. To address these problems, current federal and state laws offer varying forms of protective services, civil remedies, and criminal punishment. For example, some laws enhance sentences for those who commit crimes against the elderly. However, these laws vary greatly depending on the type of abuse and the jurisdiction. As a result, the protection is often spotty, leaving the elderly population well protected in some states while completely exposed in others.

### A. Vulnerability of the Aging Population

People age sixty and older are a rapidly growing segment of society. In 1996, 31 million senior citizens constituted approximately 12% of the population.<sup>38</sup> By the year 2030, their numbers will more than double to 89 million, constituting 25% of the population.<sup>39</sup> Nine million of those will be over age eighty-five.<sup>40</sup> As quickly as the elderly population grows, however, crime against the elderly is growing more rapidly. From 1985 to 1991, personal crimes increased by 90%, from 627,318 to 1,100,000.<sup>41</sup>

The elderly who are institutionalized or who receive care at home are especially vulnerable to physical and mental abuse. The victim often depends on the abuser for daily needs and remains at the abuser's mercy.<sup>42</sup> Even if victims are physically or mentally able to communicate

---

38. See Starnes, *supra* note 21, at 202.

39. See *Labor Health and Human Services Appropriations: Hearings on 1997 President's Budget*, 104th Cong. 895 (1996) (statement of Fernando M. Torres-Gil, Assistant Secretary for Aging).

40. *Id.*; see also Moskowitz, *supra* note 20, at 86. Two notable factors are that (1) the number of people over eighty-five is growing faster than the elderly population in general, and (2) the elderly population is predominantly female. *Id.*

41. See Murch, *supra* note 21, at 53; see also Starnes, *supra* note 21, at 202. Starnes indicates the elderly account for at least thirty percent of the nation's victims of fraud. *Id.*

42. See *Robinson*, 600 A.2d at 362 (noting that when confronted with abusive language, the resident may have "no choice but to sit and listen, or perhaps to sit and try *not* to listen") (quoting *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring)); see also Polisky, *supra* note 37, at 386 (noting that abuse often occurs "where care givers are placed in extremely difficult situations and lack the necessary skills to deal effectively with those situations").

what is being done to them, they are often reluctant to report it.<sup>43</sup>

While senior citizens living independently may not be as vulnerable to physical and mental abuse, they are especially vulnerable to financial abuse. They account for 60% of the \$60 billion annual loss due to fraud.<sup>44</sup> In an attempt to combat this growing problem, the Senate Committee on Aging conducted a survey in the early 1980s to determine the frequency of economic frauds against the elderly and the impact on the lives of victims.<sup>45</sup> The survey showed that consumer frauds are widespread, pervasive, and increasing at the rate of about 12% per year.<sup>46</sup> The elderly are considered prime targets for such fraud.<sup>47</sup> They are victimized more often than the younger population,<sup>48</sup> are likely to

---

43. See *Robinson*, 600 A.2d at 362; see also Polisky, *supra* note 37, at 381. Elder abuse is significantly less likely to be reported than child abuse: one in three cases are reported for child abuse, but only one in eight cases are reported for elder abuse. *Id.*

44. See *Consumer Fraud*, *supra* note 26, at 97. Elderly fraud victims are not isolated cases, but a widespread social problem that takes an unacceptably heavy toll on the victims' resources and self-esteem. Elder abuse is serious, pervasive, intrusive, and psychologically destructive to its victims. *Id.*; see also Terrie Lewis, Comment, *Fifty Ways to Exploit Your Grandmother: The Status of Financial Abuse of the Elderly in Minnesota*, 28 WM. MITCHELL L. REV. 911, 927 & n.101 (2001) (noting that when reporting on telemarketing fraud and cyberscams, Senator Ron Wyden stated that \$40 billion is "enough to pay for a full year of nursing home care for more than a million elderly") (quoting *Elder Fraud and Abuse: New Challenges in the Digital Economy: Hearing Before the Senate Special Comm. on Aging*, 106th Cong. 1 (2000) (statement of Sen. Ron Wyden); see also Seniors Safety Act of 1999, S. 751, 106th Cong. § 2(a)(7) (1999); Bratkiewicz, *supra* note 6, at 587 (noting that Americans over the age of fifty lose more than \$14.8 billion each year to fraudulent telemarketing); Randy Fitzgerald, *Sitting Ducks*, READER'S DIGEST, Aug. 2000, at 197, 198.

45. See SPECIAL COMM. ON AGING, *supra* note 9, at 1. The nationwide survey was sent to state and local officials such as state consumer affairs offices, city police chiefs, and attorneys. *Id.*

46. See *id.* at 2; see also Polisky, *supra* note 37, at 380 (stating this is "the problem" of the next decade and century).

47. See SPECIAL COMM. ON AGING, *supra* note 9, at 2. Eighty-three percent of the police chiefs in large metropolitan areas reported that the elderly were the most frequent victims of consumer and economic frauds. *Id.*; Moskowitz, *supra* note 20, at 99 (noting that "[p]erceived wealth and physical weakness combine to make the elderly likely targets"); see also *United States v. Castellanos*, 81 F.3d 108, 110 (9th Cir. 1996). The Ninth Circuit suggests that age or physical or mental condition "may per se render a victim worthy of . . . special protection." *Id.* The court also noted that an enhanced criminal sentence may be supported by a generalized finding that members of a target group share a particular susceptibility. *Id.*; see also *United States v. Paige*, 923 F.2d 112, 113 (8th Cir. 1991) (noting that when vulnerable persons are targeted by schemers, the conduct rendered is more depraved).

48. See SPECIAL COMM. ON AGING, *supra* note 9, at 1; see also AM. ASS'N OF RETIRED PERS., *TELEMARKETING FRAUD VICTIMIZATION OF OLDER AMERICANS: AN AARP SURVEY 4* (1996). The AARP survey was sent to persons age fifty or older who

suffer greater losses, and are slower to recover.<sup>49</sup>

By virtue of being senior citizens, they are vulnerable to abuse because they are both accessible and agreeable. They are typically retired, often live at home, and therefore are more available.<sup>50</sup> They have more time to open and read the letters that others throw away as junk mail.<sup>51</sup> Because they are less mobile, they depend on the telephone for contact with friends, family, and the outside world.<sup>52</sup> Also, because many of the elderly live alone, they have no one to consult about high-pressure salesmen or questionable transactions.<sup>53</sup> Widows are especially vulnerable because their husbands often handled the family financial matters, and they consequently never gained practical experience in those areas.<sup>54</sup>

One's vulnerability to abuse can be due to cognitive impairments, physical impairments, sensory impairments, or socioemotional vulnerabilities.<sup>55</sup> The concerns of daily living often cause elderly people

---

were known to have been the victims of telemarketing fraud. The survey showed that fifty-six percent of such victims were age fifty or older, yet census figures show this age group to be only thirty-six percent of the adult population.

49. See SPECIAL COMM. ON AGING, *supra* note 9, at 1; see also Coker & Little, *supra* note 3, at 2. Elderly citizens who can no longer work "may not be able to recoup their economic losses." *Id.* As a result, they become dependent upon family members or social welfare agencies for survival and "their quality of life suffers tremendously." *Id.* Today's crooks no longer deal only in cash, checks, or credit cards. The new electronic and paper debit technologies, such as electronic funds transfers, allow the con artist to extract payment from the victims at record speed. *Consumer Fraud*, *supra* note 26, at 97.

50. See Bratkiewicz, *supra* note 6, at 588; Starnes, *supra* note 21, at 204; see also 145 CONG. REC. S3499 (daily ed. Mar. 25, 1999) (statement of Sen. Tom Daschle) (discussing the 1999 Senior Safety Act and indicating that the elderly are frequently targeted by criminals because they lack mobility, they are isolated, and they are dependent on others); Hines, *supra* note 16, at 841.

51. See *Mass Mail*, *supra* note 4, at 17-19 (statement of Stanley F. Pruss, Assistant Attorney Gen. in Charge, Consumer Protection Div., Mich. Dep't of Attorney Gen.).

Many people, fortunately, recognize this calculated deception to sell goods or services and, most notoriously, magazines. Many of us simply don't have the time to unfold the numerous papers inside, to choose between the Jaguar or Mercedes Benz from the colored, adhesive-backed perforated stamps to affix to the return card. Yet many of our citizens do have the time, and these are, disproportionately, our senior and disabled citizens.

*Id.*

52. See Lewis, *supra* note 44, at 927; see also *United States v. Kembitskey*, No. 97-50387, 1998 WL 231057, at \*2-3 (9th Cir. 1998) (upholding an enhanced sentence against a telemarketer who targeted victims residing in nursing homes or who had "repeatedly fallen victim to scams (perhaps because they [could not] remember recently suffered losses)").

53. See *Kembitskey*, 1998 WL 231057, at \*3; Starnes, *supra* note 21, at 204; see AM. ASS'N OF RETIRED PERS., *supra* note 48, at 4. The great majority of elderly people age fifty or more have family living nearby, but the common thread of vulnerability appears to include a tendency to trust strangers, an inability to recognize such fraud when it is happening, and a tendency to blame themselves when it does happen.

54. See Starnes, *supra* note 21, at 204.

55. See Wilber & Reynolds, *supra* note 30, at 64. Cognitive impairments include

to respond to any friendly voice, even an unscrupulous one.<sup>56</sup> Retirees concerned about living on fixed incomes become vulnerable to business and investment frauds.<sup>57</sup> Strained incomes leave them open to promises of big prizes, even if they have to spend money to receive them.<sup>58</sup> The desire to help others often makes them victims of bogus charities.<sup>59</sup> Their interest in politics and improving the country can leave them susceptible to vague promises to “change things.”<sup>60</sup> Even the strain of facing their own mortality can make them vulnerable to certain types of fraud.<sup>61</sup>

Elder financial abuse is a “difficult crime to detect and prosecute.”<sup>62</sup> Once victimized, the elderly are less likely to report it because of personal shame.<sup>63</sup> They may fear losing control of their money if they appear

---

decisionmaking capacity, judgment, and memory. *Id.* Physical impairments include illnesses such as Alzheimers, dementia, or other diseases. *Id.* at 65. Sensory impairments include vision and hearing problems. *Id.* at 66. Socioemotional vulnerabilities include loneliness and dependence on others. *Id.*; see also CAL. PENAL CODE § 368 (West 1999). Because of such impairments, the elderly are less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf. *Id.*; see also Baginskis, *supra* note 21, at 4; Bratkiewicz, *supra* note 6, at 589 (noting that feelings of loneliness, along with a possible deterioration in physical and mental capabilities, make the elderly attractive victims for telemarketers).

56. See Starnes, *supra* note 21, at 205. Physical incapacity can make a person grateful for any attention given and thus more vulnerable to schemes. “Many elderly victims do not believe that someone who takes the time to visit with them is trying to defraud them.” *Id.*; see also Polisky, *supra* note 37, at 379–80 (indicating that increased frailty, impaired hearing or vision, slowed motor and mental response, decreased coordination, and the anxiety they cause all lend to vulnerability, especially in elders over the age of seventy-five).

57. See SPECIAL COMM. ON AGING, *supra* note 9, at 10.

58. See Michela, *supra* note 6, at 574 (“We found the elderly intent on enlarging their nest egg . . . and often interested in generating money for their grandchildren . . .”) (quoting *The Nature and Extent of Telemarketing Fraud and Federal and State Law Enforcement Efforts to Combat It: Hearings Before the Commerce, Consumer and Monetary Affairs Subcomm. of the House Comm. on Government Operations*, 101st Cong. 87 (1990)).

59. See SPECIAL COMM. ON AGING, *supra* note 9, at 8.

60. See Walsh, *supra* note 1.

61. See *United States v. Stewart*, 33 F.3d 764, 771 (7th Cir. 1994). An insurance agent promised elderly victims their money would create annuities to fund the victims’ funeral expenses; unused funds would go to heirs. *Id.*

62. See *Boyce v. Fernandes*, 77 F.3d 946, 948. (7th Cir. 1996).

63. See Murch, *supra* note 21, at 55. Fraudulent telemarketers will threaten that children will take control over bank accounts and credit cards if the elderly tell them about the fraud. *Id.* at 55–56; see also Polisky, *supra* note 37, at 381–82. Reasons for which the elderly do not report abuse include the fear of retaliation from abusers and self-blame that they are the major cause of the abuse. *Id.*; see also Moskowitz, *supra* note 20, at 100; Starnes, *supra* note 21, at 204.

unable to care for themselves.<sup>64</sup> Also, these victims are often unreliable witnesses because of limited mental capacity impaired by old age.<sup>65</sup>

In contrast, the perpetrators of economic frauds are well organized and effective.<sup>66</sup> They have “schools for scoundrels” and sell “sucker lists” to each other.<sup>67</sup> They scan obituary notices and public real estate lists for potential victims.<sup>68</sup> Once they identify victims, they contact them by phone, by mail, or in person.<sup>69</sup> The tactics they use to sell their victims include the following: scare techniques involving the impending peril of Social Security, “rush deals” in which the victim must make an immediate decision,<sup>70</sup> and required “secrecy” surrounding the fraudulent offer. Secrecy not only induces the victim to agree because the deal is

---

64. See Starnes, *supra* note 21, at 204; see also Murch, *supra* note 21, at 55–56.

65. See *Boyce*, 77 F.3d at 948. The victim was a seventy-five-year-old woman afflicted by senile dementia. Her granddaughter alerted authorities, and they discovered that the elderly woman’s caretaker had abused her, tricked her into signing a power of attorney, taken her car and furniture, and then placed her, confused and disheveled, in a nursing home. *Id.*; see also *Mass Mail*, *supra* note 4, at 78–79 (statement of Stanley F. Pruss, Assistant Attorney Gen. in Charge, Consumer Protection Div., Mich. Dep’t of Attorney Gen.). An elderly gentleman who suffers from dementia spent \$30,000 with Publishers Clearinghouse in only eighteen months. *Id.*

66. See SPECIAL COMM. ON AGING, *supra* note 9, at 4. This information came from a survey of police chiefs of different sized cities, consumer affairs offices, and district attorney fraud units. *Id.* at 3; see also Starnes, *supra* note 21, at 206–11. Common types of fraud include telemarketing, investment schemes, false charity solicitation, health care fraud, home repair fraud, mail fraud, and bank fraud. *Id.*

67. See SPECIAL COMM. ON AGING, *supra* note 9, at 4; see also Bratkiewicz, *supra* note 6, at 591–92. Bratkiewicz details the phases through which telemarketers work, using as many as four employees to work on one customer. *Id.* First, they use a “fronter” to make the initial contact. Next, when the deal is imminent, the elderly victim is referred to a “closer,” who methodically and systematically work together to drain the elderly victim’s financial resources. *Id.* This process is known as reloading to telemarketing insiders. *Id.* at 592. Finally, in an effort to strip the elderly of all of their resources, the telemarketer uses what is known as the “recovery room tactic.” *Id.* Here, the telemarketer calls the elderly victim and, for a small fee, offers to recover the money lost to the telemarketing scams. *Id.* Unfortunately, the “recovery room” is simply a part of the scam. *Id.* The money is never recovered, and the financial loss has increased because the victim has often sold personal property or taken out bank loans to finance the bogus recovery effort. *Id.*; see also Hines, *supra* note 16, at 844–46 (describing in detail the process by which telemarketers fraudulently financially abuse the elderly).

68. See Starnes, *supra* note 21, at 210 (indicating that when looking for people to victimize in home repair scams, perpetrators check the obituaries looking for widows as targets because they may not be “knowledgeable about the types of repairs and the necessity of having them preformed”). The Internet is another source of names because many elderly are online. See *Consumer Fraud*, *supra* note 26, at 97.

69. See SPECIAL COMM. ON AGING, *supra* note 9, at 4.

70. See *id.*; see also Kate Santich, *Gotcha! Fraud Hits the Elderly More than Any Other Crime*, ORLANDO SENTINEL, Feb. 23, 1997, at 7, 8, available at 1997 WL 2757753. Victims are told they have won \$10,000, but the caller needs their bank account number so they can deposit the money. “Hurry, all prize money must be distributed by midnight tonight!” *Id.*



not available to everyone, but also affords protection for the scammer.<sup>71</sup> These forms of victimization are merciless and call for the strongest possible laws.

### *B. Protection of the Elderly Under Current Law*

Every state has statutes against the abuse of elderly or vulnerable victims. The problem is that laws vary greatly from jurisdiction to jurisdiction. And while many attempts to protect the elderly are laudable, the efforts are generally inconsistent and sometimes almost nonexistent.

#### *1. Protective Services*

Senior citizens who are unable to care for themselves are either placed in institutions such as nursing homes or cared for at home by family or outside caregivers. All states have enacted protective statutes,<sup>72</sup> but these statutes generally do nothing to punish abusers.<sup>73</sup>

Many state statutes are patterned after the Older Americans Act of 1965.<sup>74</sup> A typical statute authorizes some administrative department to investigate abuse and to provide protective services as needed.<sup>75</sup> It describes the responsibilities of the administration, such as providing

---

71. See SPECIAL COMM. ON AGING, *supra* note 9, at 4; see also *Consumer Fraud*, *supra* note 26, at 97. The elderly may know not to give credit card numbers over the phone, but few translate this into a general warning that they should not give out any financial information. *Id.*

72. See *infra* Appendix & Comparison Table; see also Moskowitz, *supra* note 20, at 89–97. This Article gives a comprehensive examination of state protective statutes and includes helpful comparison tables.

73. See Moskowitz, *supra* note 20, at 78; Polisky, *supra* note 37, at 378. Though the laws are in place, financial support may be lacking. “[I]n 1989, \$43.03 per child was spent for protective services, as compared to \$3.80 per elderly resident for protective services.” *Id.* at 89.

74. 42 U.S.C. §§ 3001–56 (2000). Definitions in this act are found in many state statutes. “The term ‘elder abuse, neglect, and exploitation’ means abuse, neglect, and exploitation, of an older individual.” *Id.* § 3002(25). “The term ‘exploitation’ means the illegal or improper act or process of an individual, including a caregiver, using the resources of an older individual for monetary or personal benefit, profit, or gain.” *Id.* § 3002(26). “The term ‘caregiver’ means an individual who has the responsibility for the care of an older individual, either voluntarily, by contract, by receipt of payment for care, or as a result of the operation of law.” *Id.* § 3002(20).

75. *E.g.*, TEX. HUM. RES. CODE ANN. §§ 48.001–57 (Vernon 2001 & Supp. 2003). The Texas statute is typical, as it authorizes the human resources department to carry out these responsibilities. “The purpose of this [statute] is to provide for the authority to investigate the abuse, neglect, or exploitation of an elderly or disabled person and to provide protective services to that person.” *Id.* § 48.001.

services directly or contracting with private entities.<sup>76</sup> It often requires any person suspecting abuse to report it to the department, and some statutes place greater responsibilities on certain professionals such as doctors, clergy, and attorneys.<sup>77</sup> Florida has added banking personnel to the list of those specifically required to report suspicion of elder financial abuse.<sup>78</sup> When those specifically designated to report abuse fail to do so, they are subject to criminal sanctions.<sup>79</sup>

In emergencies, the department is authorized to remove the abused from physically dangerous situations.<sup>80</sup> Statutes vary from state to state.<sup>81</sup> Those afforded protection also varies. For example, the Texas statute protects the entire elderly population because it defines “elderly person” by age alone: sixty-five or older.<sup>82</sup> Other state statutes require the abused to be physically or mentally disabled to the extent they are unable to care for themselves.<sup>83</sup>

In addition, the definitions of proscribed conduct vary. Some states consider an act abusive only if it results in actual harm to the victim.<sup>84</sup>

---

76. *E.g., id.* § 48.205.

77. *E.g., id.* § 48.051(c). “The duty . . . applies without exception to a person whose professional communications are generally confidential, including an attorney, clergy member, medical practitioner, social worker, and mental health professional.” *Id.*; *see also* Moskowitz, *supra* note 20, at 80 (contending that reporting statutes have not met the goal of protecting elderly from abuse).

78. FLA. STAT. ANN. §§ 415.1034(1)(a)(7), 415.111(1) (West 1998 & Supp. 2003).

79. *E.g., TEX. HUM. RES. CODE ANN.* § 48.052. Failure to report suspected abuse, exploitation, or neglect is a class A misdemeanor. *Id.* The department must investigate the situation. *Id.* § 48.151.

80. *E.g., id.* § 48.208 (authorizing the state’s protective services agency to petition the court for a protective order, and further authorizing the agency to remove the elderly person from the dangerous situation if the court is not available to rule on the motion). Guardianships may be provided for persons who, because of physical or mental conditions, are unable to care for themselves. *Id.* § 48.209.

81. *See* Moskowitz, *supra* note 20, at 90. The statutes are extremely diverse, with varying definitions, prohibited conduct, and even placement. *Id.*; *see also infra* Appendix & Comparison Table.

82. *See TEX. HUM. RES. CODE ANN.* § 48.002(a)(1). “‘Elderly person’ means a person 65 years of age or older.” *Id.*

83. *See, e.g., ALASKA STAT.* § 47.24.900(16) (Michie 2002) (“‘[V]ulnerable adult’ means a person 18 years of age or older who, because of physical or mental impairment, is unable to meet the person’s own needs or to seek help without assistance.”). The Older Americans Act defines “older individual” as “an individual who is 60 years of age or older.” *See* 42 U.S.C. § 3002(38) (2000); *see also id.* § 3002(8). Where disability is required for protection, the Older Americans Act defines “disability” as:

a disability attributable to mental or physical impairment . . . that results in substantial functional limitations in 1 or more of the following areas of major life activity: (A) self-care, (B) receptive and expressive language, (C) learning, (D) mobility, (E) self-direction, (F) capacity for independent living, (G) economic self-sufficiency, (H) cognitive functioning, and (I) emotional adjustment.

*Id.*

84. *E.g., TEX. HUM. RES. CODE ANN.* § 48.002(2)(A) (“‘Abuse’ means: . . . the

Others find abuse merely in the commission of the prohibited act.<sup>85</sup> A few states do incorporate criminal provisions into protective statutes.<sup>86</sup> California criminalizes any act that inflicts physical pain or mental suffering on victims sixty-five or older.<sup>87</sup> It also punishes caretakers who embezzle funds.<sup>88</sup>

While elderly protective services are an invaluable tool in combating elder abuse, most serve a limited purpose. In order to be more effective, states could strengthen statutes by adding criminal penalties for abusive acts. Protective statutes, when used in a comprehensive system of laws, can help fight the fraud and exploitation that victimize the aging population.

## 2. Civil Law

Civil law permits the victims of abuse to sue the perpetrators, allowing compensation for losses due to injury.<sup>89</sup> Victims can bring suit for different torts, depending on whether the injury is physical, mental, or financial. For instance, suit for physical abuse can be brought as a battery.<sup>90</sup> Suit for emotional abuse can be designated as an assault<sup>91</sup> or

---

negligent or wilful [sic] infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical or emotional harm or pain to an elderly or disabled person . . ."); *see also* 42 U.S.C. § 3002(13). The Older Americans Act defines "abuse" to include the "willful infliction . . . of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish . . ." *Id.* "The term 'physical harm' means bodily injury, impairment, or disease." *Id.* § 3002(39).

85. *E.g.*, FLA. STAT. ANN. § 415.102(1) (West 1998 & Supp. 2003) ("'Abuse' means . . . an action . . . which could reasonably be expected to result in physical or psychological injury . . . of a disabled adult or an elderly person by any person.").

86. *See infra* Appendix & Comparison Table; *see also* Moskowitz, *supra* note 20, at 91–92. The penalties vary from misdemeanor to felony. The tables give detailed comparisons.

87. CAL. WELF. & INST. CODE § 15656(a)–(b) (West 2001). Acts committed in circumstances likely to produce great bodily harm or death are punishable by imprisonment from one to four years. *Id.* Acts under other circumstances are punished as a misdemeanor. *Id.* This section is identical to CAL. PENAL CODE § 368 (West Supp. 2004).

88. CAL. WELF. & INST. CODE § 15656(c). Acts of embezzlement by caretakers carry prison time from one to four years for losses over \$400. *Id.* For losses less than \$400, fines of up to \$1000 and jail time up to one year can be imposed. *Id.*

89. *See* LAFAYE & SCOTT, *supra* note 37, § 1.3, at 12–13; *see also* STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 1:3, at 12–13 (1983). The court determines who is at fault and the amount of damages, and renders judgment directing the party at fault to pay. *Id.*

90. *See* RESTATEMENT (SECOND) OF TORTS § 13 (1965). A tortious battery is

intentional infliction of emotional distress.<sup>92</sup> Victims of financial abuse can sue for fraud under contract law or consumer protection laws.<sup>93</sup>

A major difficulty in applying civil law to combat elder abuse is that the victims must bring the suit.<sup>94</sup> Those who are unable to do so receive no guidance in this area of the law.<sup>95</sup> Victims may be overwhelmed by the abusive situation and embarrassed to acknowledge it.<sup>96</sup> Even if shame and embarrassment would not prevent them from acting on their own behalf, they are unlikely to know how to sue or even that laws exist to help them.<sup>97</sup> The burden is even greater because they often lack the financial resources or emotional stamina to initiate an action, much less face the possibility of a lengthy court battle.<sup>98</sup> Civil law is also limited because it only affects the abuser financially. Even if the elderly bring suit, win, and receive compensation for injury, the abuser is still free to find another victim.<sup>99</sup>

Like protective services, civil laws alone are severely limited in the

---

harmful or offensive contact with a person that results from an act intended to cause the victim to suffer from such contact, or an act that causes apprehension of imminent harmful contact. *Id.*

91. *Id.* §§ 21, 24, 29 (1965). “Assault” requires a threat of force against the victim accompanied by an apparent ability to immediately carry out the threat. *Id.* But see Polisky, *supra* note 37, at 387. Many forms of elder abuse are not included in the statutory definitions of tort crimes. For instance, emotional abuse may not meet the definition of a legal assault if it merely causes humiliation, embarrassment, or depression rather than constituting a threat of force against the victim. *Id.*

92. RESTATEMENT (SECOND) OF TORTS § 46 (1965) (“One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . . .”); see also Polisky, *supra* note 37, at 387 (noting that some courts have been reluctant to consider the infliction of emotional distress as a tort, reasoning that mental consequences are difficult to anticipate as a reasonable proximate cause of harm; however, other courts have recognized it as a separate cause of action).

93. See RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981). Contracts induced by fraudulent misrepresentation are voidable by the recipient. *Id.*; see also SPECIAL COMM. ON AGING, *supra* note 9, at 15 (noting that all states have consumer protection statutes against fraud).

94. See Polisky, *supra* note 37, at 387–88.

95. *Id.* at 388.

96. *Id.* “[T]he victim may [also] fear retaliation and consequently may not want to be subjected to the trauma of confronting the abuser.” *Id.*

97. *Id.* Dementia may keep the victim from remembering details of the offense. *Id.*; see also Seymour Moskowitz, *New Remedies for Elder Abuse and Neglect*, PROB. & PROP., Jan./Feb. 1998, at 52, 55–56. Litigation is infrequent because (1) elder persons simply do not file many lawsuits, (2) they fear retaliation, (3) memory or communication problems make them poor witnesses or advocates, (4) the litigation process with unfamiliar surroundings is often uncomfortable or even traumatic, or (5) they fear it will make the situation worse. *Id.*

98. See Polisky, *supra* note 37, at 388.

99. *Id.* at 388–89. Because tort law does not impose a criminal record, the worst punishment the abuser faces is being fired; he can be hired elsewhere and more victims are put at risk. *Id.*

war on elder abuse. Yet they are valuable tools when combined with other remedies.<sup>100</sup> A perpetrator who must compensate his victims as well as face other punishment may be dissuaded from abusing another victim.

### 3. Criminal Law

Society benefits if we criminalize abuse of the elderly. The criminal law's scope is broader than the sanctions offered by civil law. It not only punishes the perpetrator, but also protects the victim and society as a whole. Without criminal laws, the abuser rationalizes that society condones this predatory behavior, and victims feel powerless to seek help to stop the abuse.<sup>101</sup> By criminalizing elder abuse, society firmly denounces the notion that abuse is an effective and acceptable means of controlling others.<sup>102</sup> Unlike the measures necessary for the elderly to institute a civil action, the criminal justice system prosecutes on their behalf, so victims need not bring suit privately.<sup>103</sup> Criminal prosecution protects all of society as it punishes harmful conduct or situations likely to result in harm if allowed to continue.<sup>104</sup> Additionally, in some states a criminal record keeps the abuser from working in positions that put

---

100. See Moskowitz, *supra* note 20, at 101–04. Finding a fiduciary relationship between the abuser and victim gives greater legal protection. *Id.* This fiduciary relationship can even be “imposed” when a person has voluntarily undertaken the care of an elderly person, particularly if the person is disabled. *Id.* at 103. Where the elderly person is dependent and has allowed a third party to handle assets, a “constructive trust” requires the fiduciary to use resources only for the benefit of the older person. *Id.* at 103–04.

101. See Candace J. Heisler, *The Role of the Criminal Justice System in Elder Abuse Cases*, 3 J. ELDER ABUSE & NEGLECT 5, 7 (1991). Historically, when violence occurred in the home, society either did not get involved or restricted the involvement to mediation or counseling. *Id.* Law enforcement officials, prosecutors, judges, and community professionals all have critical roles to play. *Id.* at 8; see also Moskowitz, *supra* note 20, at 101–02. Tort law at one time blocked civil remedies against family members. *Id.* However, modern law allows damages in such suits. *Id.*

102. See Heisler, *supra* note 101, at 8 (discussing how law enforcement, prosecutors, judges, and community professionals all have critical roles to play); see also Polisky, *supra* note 37, at 410. Criminalizing elder abuse serves not only as a means to give penalties of imprisonment and fines but also as a means to (1) deter such crimes, (2) create a criminal record for convicted abusers, and (3) keep abusers out of care-giving situations.

103. See Heisler, *supra* note 101, at 8. To be effective, court processes must be sensitive to the fears and needs of elderly victims and give the victims sufficient support. *Id.* at 6.

104. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 1.3(a), at 16 (1986).

vulnerable victims within easy reach.<sup>105</sup>

States have recently begun to criminalize acts directed against the elderly, but protection is often limited.<sup>106</sup> Florida, for example, has criminalized the abuse of elderly or disabled adults.<sup>107</sup> The statute criminalizes physical and psychological abuse<sup>108</sup> as well as financial abuse.<sup>109</sup> It imposes strict liability on the perpetrators because it does not provide for a defense that the accused did not know the victim's age.<sup>110</sup> The statute affords limited protection, however, because it defines "elderly adults" as persons who are physically or mentally disabled to the extent that they are unable to provide adequately for their own care or protection.<sup>111</sup> It does not clearly protect persons still able to live alone.<sup>112</sup>

A more recent statute passed in Minnesota provides broader protection to elderly victims by criminalizing acts against the elderly who still live

---

105. *E.g.*, DEL. CODE ANN. tit. 16, § 1137 (1995). Licensed or registered professionals found to have caused abuse will have their licenses revoked or suspended. *Id.* A facility can also have its license revoked if management knew of the abuse and failed to take prompt corrective action. *Id.* § 1138.

106. *See infra* Appendix & Comparison Table.

107. FLA. STAT. ANN. §§ 825.101–.106 (West 2000 & Supp. 2003). This chapter is entitled "Abuse, Neglect, and Exploitation of Elderly Persons and Disabled Adults." *Id.*

108. *Id.* § 825.102(1). "Abuse of an elderly person" means:

- (a) Intentional infliction of physical or psychological injury upon an elderly person . . . ;
- (b) An intentional act that could reasonably be expected to result in physical or psychological injury to an elderly person . . . ; or
- (c) Active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or psychological injury to an elderly person . . . .

*Id.* Such abuse is a felony of the third degree. *Id.* Aggravated abuse is a felony of the second degree. *Id.*; *see also* IDAHO CODE § 18-1505 (Michie 1997) ("Any person who abuses, exploits or neglects a vulnerable adult is guilty of a misdemeanor.").

109. FLA. STAT. ANN. § 825.103 (West 2000). "Exploitation of an elderly person" means:

[k]nowingly, by deception or intimidation, obtaining or using, or endeavoring to obtain or use, an elderly person's . . . funds, assets, or property with the intent to temporarily or permanently deprive the elderly person . . . of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person . . . .

*Id.* The abuse must be by a person in a position of trust or business relationship with the elderly person or who "knows or reasonably should know that the elderly person . . . lacks the capacity to consent." *Id.*

110. *Id.* § 825.104.

111. *Id.* § 825.101(5).

"Elderly person" means a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired.

*Id.*

112. *See id.*

at home.<sup>113</sup> Its definition of victims is broad. It defines “vulnerable adults” as persons, regardless of residence, who because of physical or mental infirmity, are unable to care for themselves without assistance or have an “impaired ability to protect [themselves] from maltreatment.”<sup>114</sup> The person to be punished varies depending on the type of abuse. Though physical or mental abuse is a crime only if the perpetrator is a caregiver,<sup>115</sup> the term “caregiver” is broad enough to include family members caring for the victim.<sup>116</sup> However, financial exploitation does not require a caregiver relationship to be a crime. It expands to reach any person exploiting a vulnerable adult.<sup>117</sup> The broadest protection is given by states that criminalize abusive acts based solely on the victim’s age.<sup>118</sup>

The trend in state law appears to be moving toward greater protection for the elderly. The legal system might more effectively combat the huge wave of elder abuse if all states drafted criminal statutes for elder abuse based on age alone, thus expanding protection to persons who are vulnerable to financial abuse even though they still are able to care for their daily needs. Currently, few states have statutes that fill this gap.

#### 4. Criminal Sentencing Enhancement Statutes

Criminal sentencing enhancement statutes provide greater protection by allowing more severe sentences for any crime committed against elderly victims.<sup>119</sup> These statutes are advantageous in that they compliment laws already in existence. The federal government led the way in the 1980s with a general enhancement statute.<sup>120</sup> Other federal and state statutes have followed.<sup>121</sup>

---

113. See MINN. STAT. ANN. §§ 609.232, 609.234 (West 2003).

114. *Id.* § 609.232(1)(4).

115. *Id.* § 609.2325.

116. *Id.* § 609.232(2). “‘Caregiver’ means an individual or facility who has responsibility for the care of a vulnerable adult as a result of a family relationship, or who has assumed responsibility for all or a portion of the care of a vulnerable adult voluntarily, by contract, or by agreement.” *Id.*

117. *Id.* § 609.2335(1)(2)(i). “Whoever does any of the following acts commits the crime of financial exploitation: . . . [I]n the absence of legal authority . . . acquires possession or control of an interest in funds or property of a vulnerable adult through the use of undue influence, harassment, or duress . . .” *Id.*

118. *E.g.*, CAL. WELF. & INST. CODE § 15610.27 (West 2001) (sixty-five or older).

119. See *infra* Appendix & Comparison Table.

120. 18 U.S.C.S. app. ch. 1 (Law. Co-op. 2003).

121. See 18 U.S.C. §§ 2325–27 (2000) (SCAMS Act); see also CAL. PENAL CODE §

In 1984 the United States Sentencing Commission promulgated guidelines for appropriate sentencing of persons convicted of federal crimes.<sup>122</sup> The Federal Sentencing Guidelines are a clear, mathematical process and provide enhanced sentences for certain crimes.<sup>123</sup> They start with a base level of punishment for particular crimes.<sup>124</sup> They then add numerical units to increase the sentence. These can be based on specific characteristics of the offense, such as the amount of loss or whether more than minimal planning was involved.<sup>125</sup> They can also be based on the status of the victim, such as one's being particularly vulnerable.<sup>126</sup> They can also focus on the particulars of the perpetrator, including one's being in a position of trust.<sup>127</sup> Likewise, the sentence might be reduced if the perpetrator accepted responsibility.<sup>128</sup> After all units are added and subtracted, the resulting sentence level determines the final punishment.<sup>129</sup> Judges have discretion to further depart from the sentencing structure if they find that circumstances do not sufficiently fit within the guidelines.<sup>130</sup>

A "vulnerable victim" crime allows sentence enhancement if the offender has actual or constructive knowledge that the victim of the offense was "unusually vulnerable due to age, physical or mental condition, or [was] otherwise particularly susceptible to the criminal conduct."<sup>131</sup> In some courts the age of the elderly victim alone can spark the enhancement.<sup>132</sup> Other courts require additional factors beyond age.

---

1170 (West Supp. 2003); TEX. BUS. & COM. CODE ANN. § 17.47(c)(2) (Vernon 2002). Under Texas's Deceptive Trade Practices Act, acts that would otherwise carry a \$2000 fine elicit a \$10,000 fine if the consumer is sixty-five or older. *Id.* Fines normally may not exceed \$2000 per violation or \$10,000 total. *Id.* However, action calculated to defraud consumers sixty-five or older raises the fine to \$10,000 per violation or \$100,000 total. *Id.*

122. 18 U.S.C.S. app. ch. 1, pt. A.1 (created by the Comprehensive Crime Control Act).

123. *Id.* app. § 1B1.1.

124. *Id.*

125. *Id.*

126. *Id.* § 3A1.1.

127. *Id.* § 3B1.3.

128. *Id.* § 1B1.1.

129. *See* United States v. Calozza, 125 F.3d 687, 689 (9th Cir. 1997) (providing a detailed example of how to apply the sentencing guidelines to specific facts); *see also id.* at 691 (determining the sentence enhancement guidelines cannot be applied to statutes that already set sentences based on crimes against the elderly because of constitutional protections against double jeopardy).

130. 18 U.S.C. § 3553(b) (1988); *see also* 18 U.S.C.S. app. ch. 1, pt. A, intro. cmt. 4(b). The aggravating or mitigating circumstances must be "of a kind, or to a degree, not adequately taken into consideration [by the Commission] . . . that should result in a sentence different from that described." *Id.* (quoting 18 U.S.C. § 3553(b)).

131. 18 U.S.C.S. app. § 3A1.1(b) & cmt. 2 (providing that courts may adjust the sentence upward by two levels); *see also* United States v. Stewart, 33 F.3d 764, 770 (7th Cir. 1994) (stating there is no requirement that the victim must suffer financial loss).

132. United States v. Castellanos, 81 F.3d 108, 110 (9th Cir. 1996) (observing that



However, even general factors, such as facing the inevitable physical or mental consequences of one's own mortality, can classify the elderly person as "unusually vulnerable."<sup>133</sup> The classification may also be supported by a "generalized finding that the members of a targeted group share a particular susceptibility."<sup>134</sup> An abuser who stands in a position of trust with the victim can be given even further enhancement.<sup>135</sup> A court must add two offense levels "[i]f the defendant abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense."<sup>136</sup>

For example, the court in *United States v. Stewart* applied both enhancements to increase the punishment for an insurance agent who fraudulently sold annuities to the elderly.<sup>137</sup> The agent promised that annuity funds would cover all future funeral expenses and that any additional money would build an estate for their heirs.<sup>138</sup> Three hundred

---

the plain language of the guideline suggests that vulnerability due to age per se was intended); see also *United States v. Kembitskey*, No. 97-50387, 1998 WL 231057, at \*2 (9th Cir. 1998) (upholding an upward adjustment under § 3A1.1(b) because the defendant knew or should have known the victims were unusually vulnerable due to their age); *United States v. Stover*, 93 F.3d 1379, 1386 (8th Cir. 1996) (stating that age is an expressly enumerated type of victim vulnerability).

133. *Stewart*, 33 F.3d at 771. "The evidence supports an inference that Stewart targeted the elderly because he was aware of their concern about providing for their own terminal expenses without burdening their families." *Id.*

134. *Castellanos*, 81 F.3d at 110. A real estate investment company targeted Hispanic investors. The court said that just because the victims were Hispanic they were not "vulnerable adults," but stated that the comments and case law make clear that the vulnerable adult classification may be supported by a generalized finding that members of a target group share a particular susceptibility. *Id.*

135. See 18 U.S.C.S. app. § 3B1.3.

136. *Id.*; see also *Stewart*, 33 F.3d at 768. A defendant occupies a position of public or private trust if he or she holds a professional or managerial position and has access to or authority over valuable things. *Id.* That position of trust "significantly facilitated the crime" if the position made it significantly easier to commit or conceal the crime. *Id.*

137. *Stewart*, 33 F.3d at 771.

138. *Id.* at 766. "Stewart was president and the operator of Pre-Need Services, Inc., an insurance firm specializing in the sale of annuities to the elderly." *Id.* at 765. He organized funeral directors to act as his agents to sell annuities to elderly persons to pay for their funeral expenses. *Id.* at 766. The victims were advised they could purchase an annuity that would pay the future expenses of their funerals while at the same time reducing their estate in order to qualify for Medicaid funds for nursing home expenses. *Id.* The elderly were informed the cost of the annuity would be less than the actual price of the funeral services, and any excess amount could go to their heirs. *Id.* Stewart used a pyramid scheme in which he used money from new clients to pay the expenses of previous clients. *Id.* Stewart induced 316 elderly persons to forward \$1.1 million into his scheme. *Id.* at 765. Instead of purchasing annuities, he converted the money for his

sixteen people lost \$1,100,000 in this scheme.<sup>139</sup> The court increased the sentence by four levels because the agent's victims were elderly and because he abused a position of trust.<sup>140</sup>

In the Second Circuit, a court imposed a sentence even beyond the enhancement guidelines because the victim suffered a great degree of harm.<sup>141</sup> When a stockbroker's great-aunt trusted him to invest her life savings of \$893,700 for her benefit, he completely depleted her assets while living extravagantly at her expense.<sup>142</sup> He left her "financially dependent on the generosity of others, quite possibly for the rest of her life."<sup>143</sup> The court determined that the devastating result of this crime had not been adequately considered by the Commission in setting enhancements.<sup>144</sup> It allowed the addition of five months to the maximum prison sentence permitted by the enhanced guidelines.<sup>145</sup>

The recent SCAMS Act is another excellent example of protection through the enhancement of sentences.<sup>146</sup> In 1994, Congress enacted the Senior Citizens Against Marketing Scams Act, which affects telemarketers who violate federal fraud statutes.<sup>147</sup> If the offense targets persons over the age of fifty-five, up to fifteen additional years may be added to any sentence for fraud.<sup>148</sup> Another important feature of the statute requires mandatory restitution to the victim for all losses suffered by the victim determined to be a proximate result of the offense.<sup>149</sup> Some states have followed with their own enhancement statutes. For example, California's general enhancement statute states that any prison sentence may be enhanced by circumstances in aggravation.<sup>150</sup> One such circumstance in

---

own use. *Id.* at 766.

139. *Id.* at 765.

140. *Id.* at 771.

141. *United States v. Kaye*, 23 F.3d 50, 53 (2d Cir. 1994).

142. *Id.* at 51–52. Though the victim became concerned and questioned her abuser about the finances, he continually assured her that she would get her money. *Id.*

143. *Id.* at 52, 53.

144. *Id.* at 53.

We conclude that an upward departure was warranted because (1) in formulating the fraud guideline, the Commission did not fully consider the degree of harm inflicted upon Annette Zabohonski; and (2) in formulating the vulnerable victim enhancement and the abuse of position of trust or use of special skill enhancement, the Commission did not fully consider the kind or degree of harm inflicted upon her.

*Id.* at 54.

145. *Id.* at 55.

146. 18 U.S.C. §§ 2325–27 (2000). For a more detailed discussion of the SCAMS Act, see "Telemarketing" discussion, *infra* Part III.A.4.

147. 18 U.S.C. § 2326.

148. *Id.*

149. *Id.* § 2327.

150. See CAL. PENAL CODE § 1170(b) (West Supp. 2004). Any statute that specifies three possible terms of imprisonment shall order the imposition of the middle term. *Id.*

aggravation is committing a felony against a victim who is sixty-five or older.<sup>151</sup>

Broad sentencing enhancement statutes, such as the Federal Sentencing Guidelines, may be the easiest and most immediate changes state legislatures can make to further protect the elderly. Because they piggyback onto existing criminal laws, they require no additional manpower or administration that would impact the judicial system. Most importantly, however, criminals cannot hide from their effect. Any crime that can be proven can be enhanced.

### 5. Restitution

Though criminalizing acts of elder abuse affords greater protection to abuse victims, criminal penalties do not afford complete protection because they often do not address the loss to the victim. The victim is often forgotten in criminal investigations.<sup>152</sup> This is particularly important as victims of elder abuse, in addition to being more vulnerable, are the least able to afford the loss.<sup>153</sup> In 1992, in response to this gap in protection, Congress enacted the Victim and Witness Protection Act (VWPA), which allows federal courts to order restitution to crime victims.<sup>154</sup> The SCAMS Act against telemarketing goes a step further and makes restitution mandatory.<sup>155</sup> Courts may not refuse to issue an order because of the economic circumstances of the defendant or because the victim is entitled to receive compensation for injuries from an insurance company.<sup>156</sup>

---

However, if there are circumstances in aggravation of the crime, the court may impose the higher sentence. *Id.*

151. See *id.* § 1170.85(b) (“Upon conviction of any felony it shall be considered a circumstance in aggravation in imposing a term under subdivision (b) of Section 1170 if the victim of an offense is particularly vulnerable, or unable to defend himself or herself, due to age or significant disability.”); see also *id.* § 368(g). In this statute defining crimes against the elderly, “elder” means any person who is sixty-five years of age or older. *Id.*

152. Robert G. Morvillo, *White-Collar Crime: Restitution for Victims*, N.Y. L.J., Apr. 5, 1994, at 3.

153. Michela, *supra* note 6, at 575.

154. See 18 U.S.C. § 3663(a)(1)(A) (“The court, when sentencing a defendant convicted of an offense under this title . . . may order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to any victim of such offense.”). In cases where the victim is deceased, the statute also authorizes the reimbursement of the victim’s estate. *Id.* § 3663(b)(5).

155. *Id.* § 2327. “[I]n addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.” *Id.*

156. *Id.* § 2327(b)(4)(B).

While ordering restitution is no guarantee the defendant can pay it, the threat of restitution is an important part of a comprehensive system of protection.

### *C. A Need for Uniform and Strict Laws Against Abuse*

To effectively fight physical, emotional, and financial abuse, all states need a uniform system of strict, comprehensive laws. A system to protect the vulnerable and elderly would provide protection regardless of where victims live.<sup>157</sup> Under current laws, abusers can adapt their actions to circumvent a limited law, switch to types of abuse the laws fail to address, or simply move to a jurisdiction that is more amenable to their operations.<sup>158</sup> To eliminate financial abuse, uniform laws from state to state are especially needed. Richard A. Starnes notes the following:

The number of ways that the elderly can be defrauded by those looking for an easy target is staggering. Although the federal government and state governments have enacted legislation to both heighten enforcement and to increase the penalties for those who perpetrate consumer fraud on the elderly, different jurisdictions have inconsistent responses to these crimes. Without a comprehensive plan to attach these schemes, consumer fraud swindlers will create new scams to avoid the reach of the law.<sup>159</sup>

### III. MEANS OF FINANCIALLY ABUSING THE ELDERLY AND THE GOVERNMENT'S RESPONSE

Present state and federal laws address financial, physical, and emotional abuse. Some states have even seen fit to criminalize such acts. Unfortunately, inconsistent laws and spotty protection allow far too many abusers to freely victimize the elderly. This Part addresses financial abuse and the devastation it has visited upon its elderly victims.

Financial abuse against the elderly includes schemes that, in effect, steal money or property from rightful owners. Perpetrators can be friends or strangers. Exploitation traditionally is abuse in which a trusted person uses the money for his own purpose; yet many current statutes extend the definition to cover any abuser as well. Total strangers can become abusers through fright mail, mail fraud, fraudulent telemarketing, or fraudulent charity solicitations. The abuse spreads even wider when names of potential victims are placed on mooch lists and sold to the highest bidder, another stranger.

This Part first looks at fright mail, a fairly recent form of solicitation

---

157. Starnes, *supra* note 21, at 223–24. “[A] key problem in fighting many types of fraud is finding the correct statute that covers the fraudulent activity.” *Id.* at 211.

158. *Id.* at 222; *see also* Hines, *supra* note 16, at 847–48.

159. Starnes, *supra* note 21, at 211.

that, at present, appears to fall into a gap in the laws. This Part also looks at exploitation, mail fraud, telemarketing, and charity solicitation laws and examines them to determine how a system of broad and uniform laws could be used to fight such abuse. Recent telemarketing laws provide an example of protection possible when far-reaching laws are in place. Finally, this Part addresses the heinous use of mooch lists. As was previously stated, if state and federal courts enact uniform criminal laws in addition to providing for enhanced sentences, we will more closely meet our public policy goals of protecting the vulnerable and elderly.

#### A. "Fright Mail"

Fright mail is any letter that purports to give alarming information about some political matter, but is clearly designed to frighten the recipient into sending money.<sup>160</sup> These letters come from "self-proclaimed public policy organizations in mostly legal but controversial campaigns to raise cash."<sup>161</sup> Faye Shelby is one example of the millions of seniors nationwide who receive such mail.<sup>162</sup> She was eighty-six years old and living in a senior center when she received an envelope marked "urgent."<sup>163</sup> The letter inside warned that Social Security was on the verge of collapse and she must send \$75 to help this organization fight to save it. Faye sent the \$75 dollars, fearful that if she did not, she would not receive her Social Security checks. Within a week, a letter of thanks came but asked for another \$75. She was soon besieged by such mailings—700 during a single four-month period.<sup>164</sup> The letters so distressed her that she often sat up nights, fretting over which crisis most deserved her help.<sup>165</sup>

---

160. Walsh, *supra* note 1. "[Many solicitors] are far more interested in scaring these seniors than they are in providing them with the facts." *Id.*

161. *Id.*

162. *Id.* Greg Marchildon, spokesman for the American Association of Retired Persons, stated, "Seniors are a top target of these folks . . ." *Id.*

163. *Id.*

164. *Id.*; see also Editorial, *Seniors Targeted; Don't Believe the Fright Pitches*, SYRACUSE HERALD-J., Feb. 11, 1998, at A12, available at 1998 WL 4338476. "Important-sounding words are splashed across the envelopes . . . [and] [t]he letters always come with a coupon [to return donations]." *Id.*

165. Walsh, *supra* note 1; see also Genevieve Fujimoto, *Letters to the Editor*, S.F. EXAMINER, Feb. 15, 1998, at C14, available at 1998 WL 5178653. In response to Diana Walsh's article about fright mail, see Walsh, *supra* note 1, this writer shared a similar story about her mother who lived at home, with minimal income from Social Security and small retirement benefits, but gave more than \$1000 per year to a deluge of such

Fearful that her Social Security benefits might expire, she regularly responded with donations.<sup>166</sup> Due to her response to the initial fright letter, her name was placed on dozens of mailing lists that used her name repeatedly.<sup>167</sup>

Society cannot underestimate the creativity of marketers who design such insidious promotions.<sup>168</sup> A marketer who receives only a small return on direct mail solicitations can generate profits.<sup>169</sup> The present computer generated “personal letters” can be sent in mass to elderly recipients who see their names in print and believe the senders were thinking of them personally.<sup>170</sup> “Glitzy packaging” is designed to entice recipients to read what is inside.<sup>171</sup> Though the letters claim to be informative, the language is open-ended, misleading, and emotional enough to scare older Americans into giving their money to organizations that offer to help the situation.<sup>172</sup> The Social Security Administration frequently hears from seniors frightened that their benefits will be cut off if they do not answer such letters by sending contributions.<sup>173</sup> Some solicitation letters even use the names of U.S. Senators to lend credibility to their mail in the minds of the victims.<sup>174</sup> Many of the groups soliciting the elderly have nothing to do with influencing legislation.<sup>175</sup>

---

mail. Fujimoto, *supra*.

166. Walsh, *supra* note 1. “‘I didn’t know that I could just turn them down,’ Shelby said. ‘I was thinking it was something I had to do.’” *Id.*

167. *Id.*; see also *Postal Assault on Old Folks*, S.F. EXAMINER, Feb. 15, 1998, at C14, available at 1998 WL 5178654. The use of mooch lists is “distressingly effective in moving the susceptible to contribute.” *Id.* The editorial notes that to remove themselves from commercial and nonprofit mailing lists, individuals can send their request to: Mailing Preference Service, DMA, P.O. Box 9008, Farmingdale, N.Y. 11738-9008. *Id.*

168. *Mass Mail*, *supra* note 4, at 81.

169. Walsh, *supra* note 1 (quoting Marsha Goldberger, Director of Ethics and Consumer Affairs in the Direct Marketing Association’s Washington office).

170. *Id.* One solicitor admitted to sending donors up to a dozen major pitches a month on four different letterheads. *Id.*

171. *Id.* (quoting Belinda Johns, a deputy attorney general in California); see also Kevin Demarrais, *Your Money’s Worth: Make Your Charitable Gifts Count*, RECORD (North N.J.), Dec. 7, 1997, at B1, available at 1997 WL 6913599. Some charities, including for-profit companies have sympathetic-sounding names, or names that closely resemble those of well-known charities. For instance, the American Cancer Society could be easily confused with the Cancer Fund of America. *Id.*

172. Walsh, *supra* note 1. The president of the National Center for Public Policy Research justified the frightening approach by stating they “used to write explicit letters about her plans for the donations, but the pleas went unanswered.” *Id.* In an unapologetic statement she said, “We assume most people are capable of taking care of themselves, and if there is something they have a desire about, they will let us know.” *Id.*

173. *Id.*

174. *Id.*

175. *Id.* (quoting U.S. Rep. Pete Stark, D-Hayward, “who for years has been trying to warn the public about fright mail”).

Creative promoters manage to stay just outside the reach of the law.<sup>176</sup> Fright mail has escaped legislation against fraudulent charity solicitation because the letters do not make promises, such as to spend the money on particular programs.<sup>177</sup> They may simply say “Help me fight.”<sup>178</sup> Public policy demands that victims be protected from a persistent barrage of letters containing thinly veiled falsehoods clearly designed to reach the pocketbooks of the elderly. Either new laws or the interpretation and application of existing laws to combat fright mail would meet these demands. Fright mail appears to escape prosecution,<sup>179</sup> but criminal laws against its harassing frequency could prohibit such abuse. Exploitation statutes, which will be addressed more thoroughly below, could criminalize these acts. Indeed, if a statute included “any abuser,” those who send harassing mail from distant places would be violators.<sup>180</sup> A statute that protects victims based on age alone would protect the entire elderly population.<sup>181</sup> The federal mail fraud statute could also be expanded to include punishment for such mail sent with harassing frequency.<sup>182</sup>

Financial abusers argue that their First Amendment right of free speech allows them to freely send their mail, including fright mail, without statutory restrictions and defend their behavior by claiming this constitutional authority.<sup>183</sup> However, a criminal statute that prohibits unreasonably frequent mailings of any type of solicitation to elderly or vulnerable citizens could conceivably meet a First Amendment challenge. Indeed, as the United States Supreme Court has held, in the privacy of one’s home “the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.”<sup>184</sup> Further, in *Frisby v. Schultz* the Court considered one’s right to picket. The Court held that people have a right to be protected in their own homes from speech they are

---

176. *Id.* (quoting Rep. Stark that “short of class-action suits against the groups, little can be done to stop them”).

177. *Id.*

178. *Id.*

179. *See supra* notes 168–78.

180. *E.g.*, FLA. STAT. ANN. § 825.103(a), (b) (West 2000).

181. *E.g.*, CAL. PENAL CODE § 368 (West 1999 & Supp. 2003); CAL. WELF. & INST. CODE § 15610.27 (West 2001).

182. *See supra* Part III.C.

183. *See* Walsh, *supra* note 1 (quoting Rep. Stark stating, “It’s a tenuous legal argument that frightening senior citizens is not allowable under the First Amendment”).

184. *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (determining that a statute prohibiting radio broadcasting of indecent material into a person’s home in the early afternoon did not merit First Amendment protection).

presumptively unwilling to receive.<sup>185</sup> The Court noted the state's justification for banning such speech: that this picketing causes distress to the home's occupants and had "as its object the harassing of such occupants."<sup>186</sup>

Speech concerning public issues has received great protection under the First Amendment, but it is not "equally permissible in all places and at all times."<sup>187</sup> The state may regulate the time, place, and manner of speech if the statute is content-neutral, is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication.<sup>188</sup> In *Frisby*, the Court determined that the challenged ordinance served a significant government interest because the state's interest in protecting privacy, tranquility, and well-being in one's home is of the highest importance.<sup>189</sup> People "are not required to welcome unwanted speech into their own homes."<sup>190</sup> Indeed, even speech that purports to inform the general public may become an intrusion against privacy when it targets specific residences.<sup>191</sup> As a result, the Court upheld the constitutionality of the ban on picketing a targeted residence.<sup>192</sup> Justice Stevens also argued that even protected speech should not be allowed to be constantly repeated simply to harm the recipient.<sup>193</sup> Based on similar reasoning, the U.S. Supreme Court has

---

185. *Frisby v. Schultz*, 487 U.S. 474, 488 (1988). A local ordinance stated, "It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." *Id.* at 477.

186. *Id.* at 477.

187. *Id.* at 479. In her opinion, Justice O'Connor reiterated that an antipicketing ordinance operates at the core of the First Amendment by prohibiting picketing on an issue of public concern. *Id.* However, "[e]ven protected speech is not equally permissible in all places and at all times." *Id.* (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985)) (alteration in original).

188. *Id.* at 481 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). The Court determined that ample alternative channels of communication remained open to the picketers even if they were banned from picketing particular residences. *Id.* at 483. Picketers could go door-to-door, distribute literature, or even contact residents by telephone, short of harassment. *Id.* at 484.

189. *Id.* "[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions." *Id.* at 484–85.

190. *Id.* at 485.

191. *Id.* at 486. The Court observed that even when picketers seek to disseminate a message to the general public, but target a specific resident, "their activity nonetheless inherently and offensively intrudes on residential privacy." *Id.*

192. *Id.* at 488. The Court held: "Because the picketing prohibited by the Brookfield ordinance is speech directed primarily at those who are presumptively unwilling to receive it, the State has a substantial and justifiable interest in banning it." *Id.*

193. *Id.* at 498–99 (Stevens, J., dissenting). Justice Stevens stated the following: [T]he picketers have a right to communicate their strong opposition to abortion to the doctor, but after they have had a fair opportunity to communicate that message, I see little justification for allowing them to remain in front of his home and repeat it over and over again simply to harm the doctor and his family. *Id.* at 498.



also upheld regulation of unwanted mail into one's home.<sup>194</sup>

Clearly then, if the Supreme Court has recognized the necessity for limiting intrusive speech in these contexts, a statute designed to reduce the impact of fright mail that restricts the frequency of mail sent to a person or an address could be narrowly tailored to meet these constitutional standards. Such a statute would be content-neutral. Within reasonable limits, it would permit the sending of mail and other communication to the elderly. It would, however, protect them from offensive mail that targets particularly vulnerable citizens and repeatedly invades the privacy of their homes. Under such a statute, legitimate informative messages should not be permitted to be sent repeatedly with requests for more money; it can be convincingly argued that people are presumptively unwilling to receive such mail when it arrives with unreasonable frequency.

### B. Exploitation

"Exploitation" is defined as "an unjust or improper use of another person for one's own profit or advantage."<sup>195</sup> However, present laws prohibiting exploitation address the improper use of another person's financial resources.<sup>196</sup> A Delaware chancery court addressed this issue almost fifty years ago when a young couple exploited a seventy-three year old man by befriending him and then accepting unusually large gifts from him.<sup>197</sup> The court determined that a fiduciary relationship had developed, and therefore, their acceptance of a large monetary gift was presumed to involve fraud.<sup>198</sup> It held that "[t]he relative position of parties may be such that a donor must be saved from himself, if not by the intended donee's refusal, then by court action."<sup>199</sup> The court ordered the money

---

194. See *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 740 (1970). The regulation required the Postmaster General to order names removed permanently from mailing lists if the recipients determined the mail was sexually provocative and requested such removal. *Id.*

195. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 438 (1989).

196. E.g., TEX. HUM. RES. CODE ANN. § 48.002 (Vernon 2001); see also Church, *supra* note 2, at 55. Ruth Crosson, age seventy-nine, was exploited when she trusted an insurance agent who promised low risk investments with a thirteen percent return. She invested \$100,000 of her life savings, plus additional money borrowed on a life insurance policy. The agent's Ponzi scheme (using money from new victims to make payments—for a brief time—to earlier ones) took it all. She now works to support a meager pension. *Id.*

197. See *Swain v. Moore*, 71 A.2d 264, 267 (Del. Ch. 1950).

198. *Id.*

199. *Id.* at 268.

returned.<sup>200</sup>

Federal law offers protection by criminalizing mail fraud and wire fraud and allowing the enhancement of sentences for crimes against “vulnerable victims.”<sup>201</sup> For example, in *United States v. Caterino*, members of the Caterino family contacted victims by phone, sold them nearly worthless coins at outrageous prices, and used the postal system for payment and delivery.<sup>202</sup> They were convicted of mail fraud, wire fraud, and conspiracy. Their sentences were then enhanced because the victims were “elderly and vulnerable to a fraudulent scheme.”<sup>203</sup>

Protection in state law varies greatly depending on the statute.<sup>204</sup> While almost all states have statutes against exploitation, these statutes vary in their definitions of “exploitation,” their criteria of perpetrators, their criteria of victims, and their degrees of protection. First, the definitions of exploitation vary. In most elder abuse statutes, exploitation refers to one’s illegally or improperly “using the resources” of an elderly person for monetary or personal gain without that person’s consent.<sup>205</sup> In most states, “using the resources” is broadly defined,<sup>206</sup> but a few states require “substantial monetary or property loss.”<sup>207</sup> Second, the criteria defining a perpetrator vary. A few states require that the perpetrator be in a

---

200. *Id.*

201. 18 U.S.C. § 1341 (2000). Under the Federal Mail Fraud Act, persons who use the postal service to obtain money or property by false representations or promises shall be fined or imprisoned up to five years or both. *Id.*; see also *id.* § 1343. False representations or promises transmitted by wire, radio, or television communication in interstate or foreign commerce are punishable by fines or imprisonment for up to five years or both. *Id.*; see also 18 U.S.C.S. app. § 3A1.1 (Law. Co-op. 2003) (enhancement of two levels for crimes against vulnerable adult).

202. *United States v. Caterino*, 957 F.2d 681, 682–83 (9th Cir. 1992).

203. *Id.* at 683; see also *United States v. Kaye*, 23 F.3d 50, 51 (2d Cir. 1994) (prosecuting a stockbroker for mail fraud who defrauded his great aunt of the \$893,700 life savings she entrusted to him to invest on her behalf and enhancing his sentence based on vulnerable victim status plus an additional five months because of the degree of harm).

204. See *infra* Appendix & Comparison Table.

205. *E.g.*, TEX. HUM. RES. CODE ANN. § 48.002(3) (Vernon 2001).

“Exploitation” means the illegal or improper act or process of a caretaker, family member, or other individual who has an ongoing relationship with the elderly or disabled person using the resources of an elderly or disabled person for monetary or personal benefit, profit, or gain without the informed consent of the elderly or disabled person.

*Id.*

206. *E.g., id.*

207. *E.g.*, MASS. ANN. LAWS ch. 19A, § 14 (Law. Co-op. 2002). “Financial exploitation” means:

an act or omission by another person, which causes a substantial monetary or property loss to an elderly person, or causes a substantial monetary or property gain to the other person, which gain would otherwise benefit the elderly person but for the act or omission of such other person . . . .

position of trust.<sup>208</sup> Fortunately, a large number of states apply the law to any person, regardless of relationship with the victim.<sup>209</sup> Third, the criteria for those persons who are protected vary. Some states protect the elderly based strictly on age, such as sixty-five or older.<sup>210</sup> Other states protect all persons over eighteen, but require them to have a physical or mental impairment that requires assistance to care for their needs or to protect them from abuse.<sup>211</sup> Fourth, the degree of protection varies. Though most protective services statutes cover exploitation and allow authorities to protect victims, the abusers are not punished.<sup>212</sup> Some states, however, punish exploitation as a separate crime.<sup>213</sup> Fifth,

---

208. *E.g.*, ARIZ. REV. STAT. ANN. § 46-456 (West Supp. 2002).

A person who is in a position of trust and confidence and who by intimidation or deception knowingly takes control, title, use or management of an incapacitated or vulnerable adult's asset or property with the intent to permanently deprive that person of the asset or property is guilty of theft . . . . *Id.* § 46-456(B). People are in positions of trust and confidence with an incapacitated or vulnerable person if they have assumed a duty to provide care to the person, are a joint tenant or tenant in common with the person, or have a fiduciary relationship with the person, such as being a guardian or conservator. *Id.* § 46-456(G)(3); *see also* CAL. WELF. & INST. CODE § 15610.30 (West 2001).

209. *E.g.*, IDAHO CODE § 18-1505 (Michie 1997) ("Exploitation" means an action which may include, but is not limited to, the misuse of a vulnerable adult's funds, property or resources by another person for profit or advantage.); MINN. STAT. ANN. § 609.2335 (West 2003) ("Whoever . . . in the absence of legal authority . . . acquires possession or control of an interest in funds or property of a vulnerable adult through the use of undue influence, harassment, or duress . . ."); CAL. WELF. & INST. CODE § 15610.30.

210. *E.g.*, GA. CODE ANN. § 30-5-3 (2003) ("Elder person" means a person 65 years of age or older who is not a resident of a long-term care facility . . ."); CAL. WELF. & INST. CODE § 15610.27 ("Elder" means any person residing in this state, 65 years of age or older.).

211. *E.g.*, FLA. STAT. ANN. §§ 825.101, 825.103 (West 2000) ("Disabled adult" means a person 18 years of age or older who suffers from a condition of physical or mental incapacitation . . . or who has one or more physical or mental limitations that restrict the person's ability to perform the normal activities of daily living."); IND. CODE ANN. § 12-10-3-2 (Michie 2001) (defining "endangered adult" as individual at least eighteen years old and "incapable . . . of managing or directing the management of the individual's property or providing or directing the provision of self-care" and either harmed or threatened with harm due to neglect, battery, or exploitation of the individual's personal services or property); KAN. CRIM. CODE ANN. § 21-3437(c) (West 1995) (defining "dependent adult" as an individual eighteen years of age or older who is unable to protect their own interest, including a person cared for in an adult care home or in a private residence); *see also infra* Appendix & Comparison Table.

212. *See supra* Part II.C.1.

213. *E.g.*, MISS. CODE ANN. § 43-47-19(2) (2000) (stating that any act or omission that "contributes to, tends to contribute to or results in" exploitation is a misdemeanor punishable by a fine up to \$1000, imprisonment for up to one year, or both); IDAHO CODE § 18-1505 (Michie 1997) ("Any person who abuses, exploits or neglects a

where the act is criminalized, sentences vary greatly. Some treat it as a misdemeanor with a maximum sentence of six months or \$300.<sup>214</sup> Others treat it as a felony with a maximum thirty-year sentence.<sup>215</sup>

One concern in drafting criminal statutes is that they must be carefully drafted to withstand constitutional scrutiny for vagueness or overbreadth.<sup>216</sup> In Florida, for example, the state legislature attempted to fill the gap leading to the exploitation of the elderly. However, the court struck down the state's statute that established exploitation as a separate criminal offense.<sup>217</sup> The statute read as follows:

A person who knowingly or willfully exploits an aged person or disabled adult by the improper or illegal use or management of the funds, assets, property, power of attorney, or guardianship of such aged person or disabled adult for profit, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.<sup>218</sup>

The Florida Supreme Court declared the statute unconstitutionally vague because it contained no clear explanation of the proscribed conduct, no explicit definition of terms, and no defense of good faith.<sup>219</sup> Though the definition was identical to those found in other states, the court noted that those states only provided protective services for the abused elderly and did not criminalize the act.<sup>220</sup> The court gave clear guidance for a new statute as it explained how an Illinois statute criminalizing elder exploitation would meet a constitutional challenge.<sup>221</sup> The Illinois statute required that the perpetrator stand in a position of trust and confidence with the victim and that the perpetrator knowingly and by deception or intimidation obtain control over the victim's property with the intent to permanently deprive the victim of the use,

---

vulnerable adult is guilty of a misdemeanor."); 720 ILL. COMP. STAT. 5/16-1.3 (2003) (defining the crime of "financial exploitation" of an elderly person as a person in a "position of trust or confidence" with an elderly person who knowingly uses deception or intimidation to gain permanent control of the elderly person's property and deprives them of the use, benefit, or possession of the property); *see also infra* Appendix & Comparison Table.

214. *E.g.*, IDAHO CODE §§ 18-1505, 18-113 (Michie 1997).

215. *E.g.*, FLA. STAT. ANN. § 825.103 (West 2000). If more than \$100,000 is involved, the crime is a first degree felony with punishment of a prison term of up to thirty years and fine of up to \$10,000. *Id.* If an amount from \$20,000 to \$100,000 is involved, the crime is a second degree felony with punishment of a prison term of up to fifteen years and fine of up to \$10,000. *Id.* If less than \$20,000 is involved, the crime is a third degree felony with punishment of a prison term of up to five years and fine of up to \$5000. *Id.*

216. *See, e.g.*, *Cuda v. State*, 639 So. 2d 22, 23 (Fla. 1994).

217. *Id.*

218. FLA. STAT. ANN. § 415.111(5) (West 1991).

219. *Cuda*, 639 So. 2d at 25.

220. *Id.* at 24.

221. *Id.* at 24–25.

benefit, or possession of the victim's property.<sup>222</sup> The statute clearly defined its terms and allowed a defense if defendants acted in good faith to assist the elderly or disabled in managing their property.<sup>223</sup> The crime was punished as a felony, with sentences determined by the value of the property involved.<sup>224</sup> Though Florida struck down the original statute in 1995, the state adopted a new statute that criminalizes exploitation by either a caregiver<sup>225</sup> or by "a person who knows or reasonably should know that the elderly person . . . lacks the capacity to consent."<sup>226</sup>

As the number of elderly continues to grow, exploitation will also increase. At present, the laws among the various states allow a perpetrator who would be imprisoned in one state to go unpunished in another. If all states passed statutes that broadly and uniformly criminalize the exploitation of the elderly, society would send a clear message that it will not tolerate such acts. In addition, general sentence enhancement statutes would not only strengthen protection of the elderly, but would serve as a safety net to catch new types of crime the exploiters create.<sup>227</sup>

### C. Mail Fraud

Mail fraud includes any mail that deceives its victims into purchasing products or services to win a prize. Primary among these schemes are sweepstakes promotions that appear to promise that the recipient is a winner.<sup>228</sup> For example, an eighty-four year old California woman spent

---

222. 720 ILL. COMP. STAT. 5/16-1.3 (2003); *see also Cuda*, 639 So. 2d at 24–25.

223. *Cuda*, 639 So. 2d at 24.

224. *Id.*

225. *See supra* note 109.

226. *Id.* § 825.103(1)(b).

Obtaining or using, endeavoring to obtain or use, or conspiring with another to obtain or use an elderly person's . . . funds, assets, or property with the intent to temporarily or permanently deprive the elderly person . . . of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person . . . by a person who knows or reasonably should know that the elderly person . . . lacks the capacity to consent.

*Id.*

227. *See, e.g., supra* Part II.B.4.

228. *Mass Mail*, *supra* note 4, at 60; *see also Smythe*, *supra* note 24, at 367. Attorney General Bob Butterworth indicated that in February 1998, his office filed a civil complaint against American Family Publishers, a sweepstakes marketer, for tactics used in the solicitations which made false suggestions "that recipients were one of only two winning ticket holders competing for an \$11 million prize." Butterworth, *supra* note 4, at 61. The purpose for these type of deceptive solicitations is to place tight deadlines on the recipients in claiming the prize, convincing consumers they must act quickly by purchasing magazine to claim the prize. Those most often victimized are vulnerable

about \$1000 per year on magazines and other items just to enter sweepstakes.<sup>229</sup> To settle her accounts, her husband was forced to sell off their retirement investments.<sup>230</sup>

Sweepstakes promotions are increasingly used by both “unscrupulous and legitimate members of the business community.”<sup>231</sup> Even legitimate promoters send mailings “specifically designed by marketing experts . . . to compel the recipient to open and examine the contents.”<sup>232</sup> The most direct allurements are assurances that a named person has won a substantial sum of money. For example, a solicitation might read, “Carl Levin, you have won \$10 million.”<sup>233</sup> Most people throw away such mail because they recognize the deception and do not have the time to read it.<sup>234</sup> “Yet many of our citizens do have the time, and these are, disproportionately, our senior and disabled citizens.”<sup>235</sup> Creative language lures these citizens to believe that they will definitely win the prize, but some letters also falsely lead them to believe their eligibility is directly related to how many goods and services they purchase.<sup>236</sup> Marketing experts who target these recipients know many of them will fall for the deception, and the harm can be devastating.<sup>237</sup> Even worse, victims are deliberately and knowingly set up to be victimized repeatedly when their names are sold on mooch lists.<sup>238</sup>

---

individuals including the elderly. *See also* Smythe, *supra* note 24, at 355. Smythe indicates that fraudulent telemarketers tell their victims that they are guaranteed to win one of several prizes, including vacation packages, large-screen televisions, and cash awards. “Victims are then informed that receipt of the prize is conditional—they must pay money or buy merchandise in order to claim the award.” *Id.* at 356.

229. *Mass Mail*, *supra* note 4, at 61.

230. *Id.* An elderly Florida gentleman who suffers from dementia spent \$30,000 in eighteen months on a magazines sweepstakes, and his apartment was full of his purchases, but he never received the prize. *Id.*

231. *Mass Mail*, *supra* note 4, at 77 (statement of Stanley F. Pruss, Assistant Attorney Gen. in Charge, Consumer Protection Div., Mich. Dep’t of Attorney Gen.); *see also* Bratkiewicz, *supra* note 6, at 590–91.

232. *Mass Mail*, *supra* note 4, at 77 (statement of Stanley F. Pruss, Assistant Attorney Gen. in Charge, Consumer Protection Div., Mich. Dep’t of Attorney Gen.). Persons of all ages receive these mailings, and they are almost always unsolicited, unwanted, annoying, and frustrating. *Id.*

233. *Id.* The words are usually in large bold print. *Id.*

234. *Id.*

235. *Id.* at 78.

236. *Id.*; *see also id.* at 63 (remarks of Attorney General Bob Butterworth). Entry applications are purposely made extremely complex. Also, the message “no purchase is necessary to enter the sweepstakes [is] . . . obscured or given little or no prominence, [and] often contradicted by the content of the solicitation piece.” *Id.*

237. *Id.* at 78.

238. *Id.*; *see also* Newman Flanagan, *Message from the Executive Director*, PROSECUTOR, July/Aug. 1998, at 6, 6. “In some respects ‘fiscal abuse’ can be more devastating than the physical or psychological abuse” when people lose their life savings to slick scam artists or even family members. *Id.* “They’ve lost everything, including their pride.” *Id.*

Both the state and federal governments are beginning to address mail fraud. Under the Federal Mail Fraud Act, those who use the postal service to obtain money or property by false representations or promises are subject to a fine, five years imprisonment, or both.<sup>239</sup> In addition, sentence enhancement is available if the victim is a vulnerable adult.<sup>240</sup> State legislation generally protects against such fraud in consumer protection statutes.<sup>241</sup> Some states enhance penalties if perpetrated against senior citizens.<sup>242</sup> For instance, Minnesota adds up to \$10,000 to a fraud penalty if the victim is age sixty-two or older.<sup>243</sup>

Mail fraud statutes could provide strong protection. As discussed below, the federal SCAMS Act could be adapted to include mail fraud.<sup>244</sup> Current laws could be amended to include restitution. Also, more states could pass effective legislation to protect the elderly from financial abuse through the mail.

#### *D. Telemarketing Fraud*

Comprehensive, uniform laws can clearly be effective in ending telemarketing fraud. Not only are the elderly hurt by telemarketing fraud, but the legitimate telemarketing industry is also damaged.<sup>245</sup> As telemarketing fraud has increased, so has pressure for the federal government to do something.<sup>246</sup> Federal laws currently attack telemarketing fraud in several arenas: Wire fraud legislation covers telemarketing fraud that crosses state lines,<sup>247</sup> the Federal Sentencing Guidelines

---

239. 18 U.S.C. § 1341 (2000); *see also id.* § 1342. Fraud by the use of mail service and a fictitious name or address is also punished by fines and imprisonment for up to five years or both. *Id.*

240. *See supra* Part II.B.4.

241. *See, e.g.,* FLA. STAT. ANN. § 817.034 (West 1994).

242. *E.g.,* MINN. STAT. ANN. § 325F.71 (West 1995 & Supp. 2000); *see also* ALA. CODE §§ 8-19D-1, 2 (Supp. 2001). Alabama's recent Civil Action for Deceptive Sweepstakes Solicitations law allows punitive damages of up to three times compensatory damages. *Id.*

243. MINN. STAT. ANN. § 325F.71. "[R]estitution ordered . . . shall be given priority over imposition of civil penalties" and the victim may bring civil action and receive damages plus costs and reasonable attorney's fees. *Id.*

244. 18 U.S.C. §§ 2325-27.

245. Michela, *supra* note 6, at 578-79. Because of the deteriorating reputation of the industry, banks became very cautious about doing business with telemarketers. *Id.*

246. *Id.* at 580.

247. 18 U.S.C. § 1343. False representations or promises transmitted by wire, radio, or television communication in interstate or foreign commerce are punishable by fines or imprisonment or both. *Id.*

enhance punishment for crimes against the elderly,<sup>248</sup> and the SCAMS Act further enhances the sentence for victims over age fifty-five.<sup>249</sup> In addition, some state statutes cover intrastate telemarketing fraud.<sup>250</sup> To encourage the elderly to take steps to help themselves, a massive governmental education program was launched to educate the elderly to just hang up.<sup>251</sup>

Telemarketing fraud is similar to mail fraud. The major difference is that offers are given over the phone rather than by mail.<sup>252</sup> For instance, Mary Downs was willing to purchase \$200 worth of products in return for assurance she would win a prize worth thousands of dollars. Repeated calls and promises induced her to send over \$74,000 in hopes of a prize that never materialized. She later sent \$1950 to a “lawyer” who called and promised to recover her money.<sup>253</sup>

Telemarketing scams include fraudulent investments, “free prizes” that require a payment to “cover taxes,” and sales of worthless products at high prices in order to win a free prize.<sup>254</sup> Telemarketing has become a more than \$400 billion per year industry.<sup>255</sup> Though most of the industry operates legitimately, swindlers also recognize they can be nameless and invisible while having easy access to victims of their schemes.<sup>256</sup> Many

---

248. 18 U.S.C.S. app. § 3A1.1 (Law. Co-op. 1998).

249. 18 U.S.C. § 2326(2).

250. E.g., FLA. STAT. ANN. §§ 501.603–.626 (West 1997 & Supp. 2000); see also TEX. BUS. & COM. CODE ANN. §§ 37.01–.05 (Vernon 2002).

251. See Nat’l Ass’n of Attorneys Gen., *NAAG, AARP, FBI, & Others Announce “Operation Unload,”* NAAG CONSUMER PROTECTION REP., Dec. 1996, at 4 [hereinafter *Operation Unload*]. In a program begun in 1996 volunteers phoned people who had been specifically targeted by fraudulent telemarketers to give warnings and to help consumers protect themselves from such scam artists. See also Nat’l Ass’n of Attorneys Gen., *New York—Reverse Boiler Room*, NAAG CONSUMER PROTECTION REP., July 1997, at 25 [hereinafter *Reverse Boiler Room*]. Volunteers warned senior citizens whose names appeared on telemarketers’ mooch lists of likely victims that “they are more likely to be targeted for fraud and to use extra caution when answering the phone.”

252. See Michela, *supra* note 6, at 556–58 (discussing how customers purchase services and products in response to offers given over the phone).

253. Church, *supra* note 2, at 54. Mary Ann Downs, seventy-seven, former real estate saleswoman and widow of a judge, was grieving and ill when a telemarketer’s voice sympathized with her troubles. The voice then cheered her up with news she had won a prize worth thousands of dollars. However, to collect it she had to buy something from a marketing company. She sent \$200 for cosmetics. News came that she had surely won the prize, but had to purchase a few more products first. The prize remained illusive. Soon calls began coming from similar companies with similar stories of prizes. Seventy-four thousand dollars later, her children discovered the situation. To escape the calls she moved to another city and had an unlisted phone number. There she received a call from a lawyer who sympathized with her losses and promised he could recover her \$74,000; it would only cost her \$1950. She sent the money and never heard from him again. *Id.*

254. Starnes, *supra* note 21, at 206–07.

255. Michela, *supra* note 6, at 554.

256. *Id.* at 555 (stating that the “number and complexity of fraudulent telemarketing



telemarketers work in “boiler rooms,” where people with lists of names contact potential victims by telephone.<sup>257</sup> They rarely call victims in their own state.<sup>258</sup> By calling across state lines or from Canada, they elude state prosecution because the caller and the victim are in different jurisdictions.<sup>259</sup> Also, boiler rooms are easy to close and move in order to stay one step ahead of law enforcement officials.<sup>260</sup> Elderly citizens, especially those in failing health and with minimal income, are easy prey because they are at home to receive the calls and are susceptible to the promises of easy money.<sup>261</sup> Names of persons who send money are “reloaded” onto mooch lists and contacted repeatedly with more promises and more requests for money.<sup>262</sup>

---

scams have continued to increase and have touched literally every geographical region of the country and every segment of society”).

257. See Church, *supra* note 2, at 56–57.

In bigger boiler rooms, jobs are specialized. “Fronters” make the initial call, working from lists of entrants into legitimate prize contests or from obituaries, or sometimes just looking through the phone books for “elderly-sounding” names like Viola or Henrietta. . . . “Closers” make follow-up calls to likely marks; “reload men” make them to victims who have succumbed to previous scams. “No-sales men” make a pitch to the suspicious.

*Id.*; see also Michela, *supra* note 6, at 558–59 (discussing how telemarketers look for potential customers very similar to existing customers or who fit a specific target group for the particular product). New customer sources include phone books, magazine subscriber lists, list brokers, and club rosters. *Id.*; see also Bratkiewicz, *supra* note 6, at 591–92 (discussing telemarketing practices and sources for target customers).

258. See Church, *supra* note 2, at 56; see also Bratkiewicz, *supra* note 6, at 591–92 (discussing the transient nature of boiler room operations, which makes “the imposition of criminal and civil sanctions against illicit telemarketers especially difficult”).

259. *Id.*; see also *Consumer Fraud*, *supra* note 26, at 96 (noting that callers from Canada often do not make it clear the calls originate outside the United States, and people are unaware that U.S. rules concerning credit card dispute resolution procedures, criminal enforcement, and three-day cooling off periods do not always apply abroad).

260. See Trebilcock, *supra* note 11, at 88; see also Bratkiewicz, *supra* note 6, at 591 (indicating that boiler rooms are designed to be quickly dismantled and relocated so the telemarketer can avoid detection by law enforcement).

261. Starnes, *supra* note 21, at 204–05; see also AM. ASS’N OF RETIRED PERS., *supra* note 48, at 9 (finding that forty-two percent of persons over the age of fifty had received twenty or more calls over the past six months from telemarketers who tried to sell them something, talked to them about a contest or sweepstakes, or asked for a contribution to a charity).

262. See AM. ASS’N OF RETIRED PERS., *supra* note 48, at 9; see also *United States v. Williams*, No. 96-CR-184, 1997 WL 573379, at \*1–2 (N.D. Ill. Sept. 10, 1997). Williams purchased lists with the names and phone numbers of individuals who had responded to sweepstakes entry forms. He telephoned them, telling them that they had won a cash prize in the sweepstakes. However, he told them that before he could send it, they would have to send him money for income tax purposes. If they sent money, he would reload their names and contact them again to send more money. If they sent more

As telemarketing fraud grew, the telemarketing industry and the victims needed protection from fraudulent practices.<sup>263</sup> Legitimate businesses were not only suffering from public distrust, but also from fear and distrust in the banking community.<sup>264</sup> Both the American Telemarketing Association and the Direct Marketing Association became active in self-regulation and also spoke at congressional hearings.<sup>265</sup>

As previously indicated, the federal government has been responsive. Congress responded to this pressure by passing SCAMS, a statute that both protects elderly from fraud and provides restitution to victims. It incorporates provisions from the Mail Fraud Act and dramatically strengthens the sentences of those convicted under its provisions.<sup>266</sup> The Mail Fraud Act provides for fines and imprisonment up to five years.<sup>267</sup> SCAMS also adds five years to any prison sentence if the fraud is perpetrated through telemarketing, regardless of victim.<sup>268</sup> However, if the victim is fifty-five or older, the act adds up to ten more years to any imprisonment term otherwise imposed.<sup>269</sup> SCAMS goes an important step further, as it imposes mandatory restitution to victims for the full amount of losses proximately caused by the offense.<sup>270</sup> The federal court has almost no discretion in issuing this order. The only duty the court has is to determine how the order will be administered.<sup>271</sup> SCAMS is a model statute for both federal and state legislators fighting elderly abuse because it not only criminalizes the abusive acts, but also provides restitution to help the victim who could least afford to lose the money in the first place.

State statutes attempt to control telemarketing fraud under communication or consumer protection statutes, or with independent

---

money, the process would be repeated over and over again; but the prize never materialized. He told one victim she had won \$1 million but “not to tell anyone about the prize, because it would be better if she could surprise her family and friends.” In all, he was able to swindle victims of over \$120,000 before getting caught. *Id.*; see also Bratkiewicz, *supra* note 6, at 591–92.

263. See Michela, *supra* note 6, at 579–80. Three hundred thousand legitimate telemarketers generate \$435,000,000 in sales nationwide each year. *Id.* at 578.

264. *Id.* at 578.

265. *Id.* at 579–80.

266. 18 U.S.C. §§ 2325–27 (2000).

267. *Id.* § 1342. False representations or promises transmitted by wire, radio, or television communication in interstate or foreign commerce are punishable by fines or imprisonment for up to five years or both. *Id.*

268. *Id.* § 2326(1).

269. *Id.* § 2326(2). Offenders that victimize ten or more persons over the age of fifty-five, or who target persons over the age of fifty-five, are subject to enhanced penalties. *Id.*

270. *Id.* § 2327.

271. See *id.* The court may not decline to issue an order because of the economic circumstances of the defendant or because the victim is entitled to receive compensation for injuries from an insurance company. *Id.*

statutes, but again, they are inconsistent.<sup>272</sup> For example, Florida's statute requires telephone sales companies to register with the Secretary of State and imposes criminal as well as civil penalties against a company that operates within the state without such registration.<sup>273</sup> Nevada law requires a \$50,000 bond be posted.<sup>274</sup> Texas statutes regulate the telemarketer's activities and apply to any person making a consumer telephone call.<sup>275</sup> The sellers must give the name of the company and their own name and may only call within certain hours;<sup>276</sup> no credit card charges may be made unless the seller provides for refund of returned items, or receives a signed written contract from the consumer;<sup>277</sup> the attorney general may issue an injunction to enforce the statute and may seek civil penalties and restitution;<sup>278</sup> in addition, consumers may seek their own remedies.<sup>279</sup> Georgia has enacted a powerful statute that criminalizes deceptive, fraudulent, or abusive telemarketing,<sup>280</sup> allowing for felony prosecution and civil remedies for violation of the statute.<sup>281</sup> Acts that target the elderly bring double penalties.<sup>282</sup> However, not all states offer strong protection, and telemarketers simply move their operations to states with more favorable laws.<sup>283</sup>

In addition to enacting legislation, some states use creative techniques to combat telemarketing fraud. Iowa, for example, has successfully tried a new measure to protect the elderly. In 1993, the state asked victims to transfer their phone numbers to state investigators.<sup>284</sup> When telemarketers

---

272. See *infra* Appendix & Comparison Table.

273. FLA. STAT. ANN. §§ 501.605, 501.623 (West 2002); see also ALA. CODE §§ 8-19A-1 to 8-19A-24 (Supp. 2001). Alabama's Telemarketing Act is very extensive.

274. NEV. REV. STAT. § 599B.100(2) (Supp. 2001).

275. TEX. BUS. & COM. CODE ANN. § 37.01 (Vernon 2002). "'Telephone solicitor' means a person who makes or causes to be made a consumer telephone call, including a call made by an automated dialing device." *Id.*

276. *Id.* § 37.02. Calls can only be made between the hours of 9 a.m. and 9 p.m. on weekdays and Saturdays, and between noon and 9 p.m. on Sundays. *Id.*

277. *Id.* § 37.03.

278. *Id.* § 37.04.

279. *Id.* § 37.05. "A consumer injured by a violation of this chapter may bring any action for recovery of damages. The damages awarded may not be less than the amount paid by the buyer to the telephone solicitor, plus reasonable attorney fees and court costs." *Id.*

280. See GA. CODE ANN. §§ 10-5B-1 to 10-5B-8 (2000).

281. *Id.* § 10-5B-6. Punishment for a first offense is one to ten years; for subsequent offenses, punishment is one to twenty years. *Id.*

282. *Id.*

283. See Michela, *supra* note 6, at 561-62; see also Starnes, *supra* note 21, at 207.

284. Trebilcock, *supra* note 11, at 91.

called, their deceptive sales pitches were recorded and ultimately used as evidence in court.<sup>285</sup> The FBI, Nevada, and Ohio have followed similar approaches in trapping fraudulent telemarketers.<sup>286</sup> AARP joined the attorneys general in many states for a massive telephone campaign to warn elderly citizens of the dangers of telemarketing fraud, educating them to hang up.<sup>287</sup>

The fight against telemarketing fraud uses the SCAMS Act, strong state statutes, enforcement creativity, and public education to protect against financial abuse. States could either strengthen their own telemarketing laws or use the current statutes against fraud and add a general sentence enhancement statute for elderly victims.

#### *E. Fraudulent Charity Solicitation*

Many state laws regulate charity solicitation.<sup>288</sup> Michigan's law requires the charity or fundraising organization to register with the state before attempting any solicitation.<sup>289</sup> The charity must disclose information such as the purpose for which the charity is organized and the methods by which it intends to make solicitations.<sup>290</sup> Professional fundraisers must acquire licenses and post bonds to cover future actions against them.<sup>291</sup> Grounds for license revocation include violations of the statute or fraudulent activity.<sup>292</sup> Anyone who solicits funds under a license and then diverts them for purposes other than that for which the funds were contributed is guilty of a misdemeanor punishable by a maximum fine of

---

285. *Id.*; see also Dawn Bormann, *Phone Sharks Hang Up on Iowa*, DES MOINES REG., Jan. 29, 1998, at 1A, available at 1998 WL 3191699. Iowa has won over thirty convictions with recorded evidence. *Id.* Iowa officials sent warning signs to suspicious phone operations across the country to put on their walls. The signs say "Do not call Iowa!" *Id.*

286. Trebilcock, *supra* note 11, at 91; see also *Consumer Fraud*, *supra* note 26, at 93-98. The National Fraud Information Center receives calls and reports of fraud. It immediately forwards the information to appropriate jurisdictions and agencies, usually within three minutes of receiving the call. In 1996, a Florida woman reported that she had just sent money by overnight carrier to Toronto, Canada. Toronto police seized the money the next morning as it was being delivered. *Id.*

287. See *Operation Unload*, *supra* note 251, at 4 (noting that volunteers phoned people who had been specifically targeted by fraudulent telemarketers to give warnings and to help consumers protect themselves from such scam artists); see also *Reverse Boiler Room*, *supra* note 251, at 25 (indicating that volunteers warned senior citizens whose names appeared on telemarketers' mooch lists of likely victims that "they are more likely to be targeted for fraud and to use extra caution when answering the phone").

288. See *infra* Appendix & Comparison Table.

289. See MICH. COMP. LAWS § 400.273 (1997).

290. *Id.*

291. *Id.* § 400.287.

292. *Id.* § 400.290.

\$500, six months imprisonment, or both.<sup>293</sup> Simply put, if one can demonstrate that the funds were not used as indicated, the solicitor is subject to both civil and criminal penalties.<sup>294</sup>

#### F. Mooch Lists

Regardless of the type of financial abuse, whether by fright mail, mail fraud, telemarketing fraud, or fraudulent charitable solicitations, names that are shared through mooch lists or “sucker lists” compound the problem. Not only is the elderly victim known to the defrauder, the victim’s name is sold to others, causing the calls, letters, and personal contacts to proliferate.<sup>295</sup>

Potential customer lists are a legitimate marketing tool for advertisers.<sup>296</sup> Personal data is collected every time one applies for a credit card or answers questions about lifestyle on a warranty card. Marketing firms compile information into lists that legitimate companies can buy to create advertising campaigns.<sup>297</sup> For less than \$500, anyone can go into almost any marketing firm and obtain, for example, a list of retired adults living in a targeted area who have at least \$50,000 in savings.<sup>298</sup> Telemarketers also build their own “lead lists” from sources such as postcards filled out at malls offering the opportunity to win a new car.<sup>299</sup>

However, mooch lists are used fraudulently. The lists can command from \$10 to \$100 per name and generally include addresses and phone

---

293. *Id.* § 400.293. Other acts carrying the same penalty include any violation of the statute or soliciting for any organization that is not properly licensed. *Id.* Also, prosecution under the statute does not limit or restrict prosecution under the general criminal statutes of the state. *Id.*

294. *Id.* §§ 400.290, 400.293.

295. See Bryan Clark & Brent Willey, *Don't Be Taken in by the Phony Investing Pitches*, MONEY MAG., Mar. 1, 1997, available at 1997 WL 2490612; see also Church, *supra* note 2, at 54. AARP figures that while anyone sixty or older is likely to be on at least one mooch list, a woman seventy-five or older is virtually guaranteed to be. *Id.*; see also Trebilcock, *supra* note 11, at 90. Mooch lists include not only your name, address, and phone number, but also a history of your financial dealings with other telemarketers. *Id.*; see also *Mass Mail*, *supra* note 4, at 78 (statement of Stanley F. Pruss, Assistant Attorney Gen. in Charge, Consumer Protection Div., Mich. Dep't of Attorney Gen.). Legislation should prohibit selling, exchanging, or trading certain confidential personal information. *Id.* at 80.

296. See Trebilcock, *supra* note 11, at 89.

297. *Id.*; see also Michela, *supra* note 6, at 558. “The first and most important task every telemarketing operation must perform is to locate potential customers.” *Id.*

298. See Trebilcock, *supra* note 11, at 89–90.

299. *Id.* at 90.

numbers in addition to a history of a person's financial dealings with other telemarketers.<sup>300</sup> The lists are used in two ways. First, a telemarketing firm purchases the list to get the names of people likely to fall for a particular type of sales pitch.<sup>301</sup> Second, the names of victims who send money are reloaded to the list for repeated contact by a more experienced telemarketer, who attempts to obtain more money by telling the victim she has won more prizes but that additional taxes and expenses must be paid before shipment can be made.<sup>302</sup> Once victimized, a person is more likely to be targeted again.<sup>303</sup>

The main attack on mooch lists has been public education. The nationwide telephone campaign against telemarketing fraud called the persons named on mooch lists not to defraud them, but to warn them that their names were being sold and to educate them on how to avoid becoming victims again.<sup>304</sup> However, much more is needed. If state or federal statutes criminalized the sale or purchase of mooch lists for fraudulent purposes, especially if victims were elderly, prosecutors could more easily fight the lists' proliferation. Additionally, a federal statute would automatically carry with it the enhancement penalties for lists that contain the names of elderly persons.<sup>305</sup>

Abusers of mooch lists argue that their First Amendment right of free speech allows them to freely send mail with no statutory restrictions. However, a criminal statute that prohibited unreasonably frequent mailing of any type of solicitation to elderly or vulnerable persons could conceivably meet a First Amendment challenge. In the privacy of the home, the individual's right to be left alone clearly outweighs the First Amendment rights of an intruder.<sup>306</sup> As previously noted in the context of

---

300. *Id.*; see also *Mass Mail*, *supra* note 4, at 64. "[M]ooch lists' are pure gold to disreputable marketers who zero in on those most vulnerable to deceptive sweepstakes pitches." *Id.*; see also Tresa Baldas, *Seniors Get Help to Avoid Phone Scams*, CHI. TRIB., Aug. 20, 1998, at 4, available at 1998 WL 2887599. The lists can fetch thousands of dollars on the black market, with a single name and phone number being worth up to \$200. *Id.*; see also A.P. News, *Iowa Makes Inroads Against Scams; Telephone, Mail Fraud Costs Victims—Many Elderly—\$44 Billion a Year*, OMAHA WORLD-HERALD, Oct. 12, 1997, at 1B, available at 1997 WL 6316453. Persons on mooch lists are branded as easy marks and can count on getting a call. *Id.*

301. See Trebilcock, *supra* note 11, at 90.

302. *United States v. O'Neil*, 118 F.3d 65, 69, 75–76 (2d Cir. 1997).

303. See Trebilcock, *supra* note 11, at 90 (noting that people either learn their lesson after the first time or get hooked and lose thousands); see also Erick Schonfeld, *Caution: They're Out to Steal Your Money*, FORTUNE MAG., Aug. 18, 1997, at 142, 146. Names from mooch lists are circulated so con artists can contact them and offer to help get the victims' money back. *Id.*

304. Michela, *supra* note 6, at 608–09.

305. See *supra* Part II.C.4.

306. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (determining that a statute prohibiting radio broadcasting of indecent material into a person's home in the early afternoon does not merit First Amendment protection).

fright mail, the *Frisby* Court recognized one's right to be protected from unwanted speech,<sup>307</sup> including speech designed to harass its recipients.<sup>308</sup> It is worth emphasizing that the Constitution does not require speech to enter the marketplace unregulated<sup>309</sup> as long as the government provides alternate channels of communication. The state may regulate the time, place, and manner of speech if the statute is content-neutral, narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication.<sup>310</sup> In *Frisby*, the Court determined that ordinances serve a significant government interest because the state's interest in protecting privacy, tranquility, and well-being in one's home is paramount.<sup>311</sup> If the Court is willing to regulate unwanted mail to prevent it from entering the intended recipients' homes,<sup>312</sup> it should be willing to regulate the use of mooch lists.

A statute designed to reduce the impact of fright mail that restricts the frequency of mail sent to a person or address could meet these conditional standards. It would be content-neutral. It would permit mail and other communication to be sent, within reasonable limits, to elderly persons. It would, however, protect them from offensive mail that targets particular individuals and repeatedly invades the privacy of their homes. Even legitimate informative messages should not be allowed to be sent repeatedly with requests for more money. Recipients are presumptively unwilling to receive such mail when it arrives with unreasonable frequency. The source of the unwanted speech should not be an impediment to protection of the elderly.

#### IV. PROPOSED SOLUTIONS

There have been a number of proposed solutions aimed at preventing fraudulent telemarketers from targeting the elderly for abuse.

---

307. *Frisby v. Schultz*, 487 U.S. 474, 488 (1988). The purpose of the ban was to protect and preserve the home and allow a feeling of well-being, tranquility, and privacy. *Id.* at 477. For a detailed discussion of the courts' right to protect one's privacy in one's home, see *infra* Part III.A.

308. *Id.*

309. *Id.* at 479.

310. *Id.* at 481 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

311. *Id.* at 484 (citing *Carey v. Brown*, 447 U.S. 455, 471 (1980)). "[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions." *Id.* at 484-85.

312. *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 740 (1970).

Unfortunately, these proposals continue to leave many elderly citizens without protection. Industry self-regulation has been suggested as a means of curtailing fraudulent telemarketing practices.<sup>313</sup> It is not truly a viable option, however.<sup>314</sup> As previously indicated, the American Telemarketing Association (ATA) has taken steps to establish industry standards, but this endeavor will have little impact.<sup>315</sup> Fraudulent telemarketers are simply unlikely to participate in self-policing groups such as the ATA.<sup>316</sup>

The federal government's efforts to protect the elderly from telemarketing fraud appear to be making some headway, however.<sup>317</sup> For example, through the passage of the Telemarketing Abuse and Prevention Act of 1994 (Telemarketing Act), an act that considerably expanded Federal Trade Commission's (FTC) power to regulate telemarketing fraud, the Department of Justice (DOJ) along with the FTC have been empowered to combat illegal telemarketing.<sup>318</sup> One of the DOJ's most powerful tools in fighting fraudulent telemarketing is the wire fraud statute.<sup>319</sup> A telemarketer who is convicted under this statute can be sentenced to a maximum of five years in prison.<sup>320</sup> The DOJ may also charge telemarketers with violating money laundering<sup>321</sup> and lottery statutes.<sup>322</sup> In addition, depending on the circumstances surrounding the violations, they may also face charges for financial institution fraud.<sup>323</sup> Along with criminal sanctions, the FTC is authorized to sue "telemarketer[s] in federal court for damages on behalf of telemarketing fraud victims."<sup>324</sup>

---

313. Bratkiewicz, *supra* note 6, at 593.

314. *Id.*

315. *See id.* at 593 n.67 (citing Tracy Roth, *The ATA in Trouble*, TELEMARKETING & CALL CENTER SOLUTIONS MAG., Jan. 1, 2000, at 6, *available at* 2000 WL 16002139). "Telewatch, an independent regulatory group established by the ATA to set industry standards for telemarketing, has been plagued by a 'lack of forward momentum' and was re-absorbed by the fiscally troubled ATA." *Id.*

316. *Id.* at 593.

317. *Id.* at 593-97 (providing a detailed account of the federal government's efforts to protect the elderly from abuse).

318. *Id.* at 593.

319. *Id.*; *see also* 18 U.S.C. § 1343 (1952); 18 U.S.C. § 371 (1909).

320. Bratkiewicz, *supra* note 6, at 594 n.71.

321. *See* 18 U.S.C. §§ 1956-57 (1986).

322. *See id.* §§ 1301-02.

323. *See id.* § 1344.

324. Bratkiewicz, *supra* note 6, at 594 (citing 15 U.S.C. § 6103(a) (1994)). Bratkiewicz notes that the Telemarketing Sales Rule also aids the FTC in fighting fraud by regulating the business practices of telemarketers. *Id.* The Act prohibits abusive sales tactics, requires that telemarketers reveal the value of a prize or investment, and limits when telemarketers may call customers. *Id.* They must also disclose the actual odds of winning a prize, the costs involved, and the telemarketer's cancellation policies. *Id.* at 594-95. The Sales Rule subjects its violators to a maximum of \$10,000 per violation. *Id.* at 595.



The Telemarketing Act is not the only useful tool, however. As previously indicated, by passing the SCAMS Act, Congress strengthened the Telemarketing Act's protection for the elderly,<sup>325</sup> providing, in part, for enhanced penalties for violations and restitution for elderly victims.<sup>326</sup> By congressional directive for telemarketing regulation, the FTC has also promulgated the Telemarketing Sales Rules (Sales Rules).<sup>327</sup> The Sales Rules specifically control telephone sales practices and generally govern how telemarketers conduct business.<sup>328</sup> They prohibit abusive sales tactics,<sup>329</sup> require telemarketers to accurately convey the value of a prize or investment,<sup>330</sup> and limit when telemarketers may call customers.<sup>331</sup> As important, however, is that under the Sales Rules, telemarketers must make certain disclosures, including "the true odds of winning a prize, the total costs involved, and the telemarketer's cancellation policy."<sup>332</sup> The Sales Rules also provide for a maximum of \$10,000 per violation and require full restitution to telemarketing victims.<sup>333</sup> Congress did not seek to tie the hands of those charged with instituting the Telemarketing Act, Sales Rules, and SCAMS Act and instead left open the direction these regulations will take in the future.<sup>334</sup>

One act touted as a comprehensive legislative solution to the problems facing the elderly is the Seniors Safety Act (SSA).<sup>335</sup> The SSA addresses the adverse impact telemarketing fraud has on the elderly as

---

325. Bratkiewicz, *supra* note 6, at 595.

326. 18 U.S.C. § 2326 (1994). For a detailed discussion of the SCAMS Act, see *supra* Part II.

327. 16 C.F.R. pt. 310 (2003); *see also* Bratkiewicz, *supra* note 6, at 594.

328. 16 C.F.R. § 310.4. For a detailed discussion of the Sales Rules provision, see Bratkiewicz, *supra* note 6, at 594–95.

329. 16 C.F.R. § 310.4.

330. *Id.* § 310.3(a)(2)(v).

331. *Id.* § 310.4(c).

332. Bratkiewicz, *supra* note 6, at 594–95 (footnotes omitted); *see also* 16 C.F.R. § 310.3 (a)(1)(i)–(iv).

333. 15 U.S.C. § 45(m)(1)(A) (2000).

334. *See* Bratkiewicz, *supra* note 6, at 595. Bratkiewicz notes the following:

The Telemarketing Act requires the FTC to conduct a comprehensive evaluation of the Telemarketing Act's effectiveness five years after the adoption of the Sales Rules, and the FTC will then recommend possible modifications. Pursuant to the Telemarketing Act's directive, the FTC's evaluation should occur in the summer of 2000. The role that the Telemarketing Act and SCAMS Act will play in protecting seniors from telemarketing fraud also depends upon whether the currently pending Seniors Safety Act of 1999 . . . is enacted into law.

*Id.* (footnotes omitted).

335. Seniors Safety Act of 1999, S. 751, 106th Cong. (1999).

well as the interconnection between healthcare fraud, nursing home care, and abuse of the elderly.<sup>336</sup> As one commentator notes, the SSA would impact the present telemarketing regulatory and enforcement scheme in two ways.<sup>337</sup> First, it “centralizes telemarketing fraud information-gathering and educational efforts.”<sup>338</sup> The SSA directs the FTC to “establish a centralized telemarketing complaint and consumer education center for seniors.”<sup>339</sup> Second, the SSA amends the SCAMS Act and expands its scope by adding the phrase “wire communication utilizing a telephone service” and striking the phrase “telephone calls.”<sup>340</sup> Arguably, this change will expand the scope of the SCAMS Act to include Internet and facsimile transmission accomplished through the telephone wire.<sup>341</sup>

Unfortunately, the protections the SSA will provide to the elderly are merely speculative.<sup>342</sup> Indeed, the record keeping required under the SSA will be repetitive as the FTC and DOJ presently gather and maintain the same information.<sup>343</sup> Further, the language change designed to include punishment of fraud accomplished through Internet or electronic transactions will be ineffective because the technological advances are simply too rapid to control.<sup>344</sup> More importantly, however, as of May 10, 2004, the SSA had not been enacted into law. And it appears unlikely that the SSA will be enacted in the foreseeable future.

Finally, education has been suggested as the most effective means of reducing the impact of telemarketing fraud against the elderly and, ultimately, preventing its occurrence. Indeed, national efforts could significantly reduce the number of elderly telemarketing fraud victims. As one commentator so poignantly indicates, education also respects the elderly’s “autonomy and decision-making ability,”<sup>345</sup> and gives elderly citizens a sense of power over their own well-being. Education will be of minimal benefit, however, if it is not precisely designed to reach the group it is targeting. Specifically, much of the present effort to educate the elderly on the dangers of telemarketing focus on using the World

---

336. *Id.*

337. *See* Bratkiewicz, *supra* note 6, at 596.

338. *Id.*

339. *Id.* (indicating that in addition to the FTC’s responsibilities, the DOJ would also maintain a computerized database of all companies found guilty of engaging in illegal telemarketing practices and provide state law enforcement agencies access to the information); *see also* Seniors Safety Act of 1999, S. 751, 106th Cong. § 301(a)–(b) (1999).

340. Bratkiewicz, *supra* note 6, at 596.

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.* at 597.

Wide Web to disseminate the information.<sup>346</sup> Many organizations, including the AARP, FBI, DOJ, and FTC, offer antitelemarketing fraud information via websites.<sup>347</sup> The use of the Internet to reach the elderly is laudable, yet it cannot be the primary means of seeking to reach them. There is presently a technological divide. Many seniors do not have access to computers, let alone the Internet. Others may not have gained minimum proficiency with their computers, leaving the necessary information temporarily, and perhaps permanently, inaccessible.

While Internet use to inform the elderly should continue, other measures must also be taken. For example, soliciting community aid can also effectively reach the elderly. As mentioned previously, law enforcement agencies can take an active role by holding community meetings or regularly speaking to the elderly at senior centers.<sup>348</sup> These local educational efforts have the potential for great success if they are undertaken on a regular basis and if they seek to reach diverse segments of the community, including the elderly.<sup>349</sup> As one commentator aptly notes, the combination of both “public and private agencies into one comprehensive and coordinated effort appear[s] to work more effectively.”<sup>350</sup> The banking industry can also play a major role in protecting the elderly from abuse by becoming aware of any irregularities in their banking habits. Local banks might consider establishing a centralized division for the elderly to effectively and efficiently protect and oversee their assets. However, cooperation among state and federal agencies is the first step. Centralized reporting of telemarketer abuse of the elderly is another. Finally, there should be consistent state and federal regulations that close the gaps presently allowing fraudulent telemarketers to escape from one jurisdiction and safely reopen shop in another.

## V. CONCLUSION

Senior citizens are a growing segment of our population, but the vulnerability that accompanies aging should not make these citizens easy targets for abuse, whether financial, physical, or emotional. Public policy demands protection so their lives can be spent in dignity and without unnecessary fear.

---

346. *Id.* at 597–98.

347. *Id.* at 597 & n.106–11.

348. *See Hines, supra* note 16, at 857.

349. *Id.* at 858.

350. *Id.*

Laws do provide protection, but at the present time they are scattered in various statutes and vary significantly from state to state. If the strongest and most effective of such laws were adopted by all jurisdictions, a comprehensive, uniform system would protect our elderly more effectively from schemers, scammers, and bullies.

The simplest change states could make is to adopt a law that enhances sentences for crimes committed against elderly persons. This comprehensive change would cover crimes under current statutes as well as new crimes under future statutes. Separate statutes would criminalize abusive acts against the elderly, include any abuser, and punish the act without requiring certain results and with stiff penalties for crime. It would also make strong civil penalties available and provide for restitution and attorney fees to the victim.

Other practical issues could also be addressed. The sale or purchase of mooch lists used for fraudulent purposes should be criminalized. Statutes against fright mail, solicitation, and telemarketing should be enacted to limit the frequency of contact with elderly persons to a reasonable level. All solicitation forms should be required to include a space for “age” so the solicitor would know the age of the person contacted. Though the mere presence of strong, comprehensive, and uniform laws will not stop elder abuse, their enactment will provide the tools each person or agency needs to fight against such predatory acts.<sup>351</sup>

---

351. Whether a lawmaker or researcher can find appropriate state laws depends on how they are organized. The age of computers requires searches by “terms.” Connecting all laws by using a common term such as “elderly person” or “vulnerable adult” facilitates such searches. Some states do this. However, other states use such different terms that a search can leave many protective laws hidden. For instance, one state that has major protective laws uses different terms in different statutes. Enhancements for physical crimes against the elderly use three different ages for three different crimes, and no common term facilitates finding them. Helpful steps in some states include sections that cross reference laws in separate codes. The strongest suggestion would be to choose a term commonly used among states and use that term in every law applicable to elderly persons. Thus a computer word search would instantly identify all the protection a state affords its citizens.

## VI. APPENDIX

STATE STATUTES AGAINST PHYSICAL, EMOTIONAL, AND FINANCIAL  
ABUSE OF ELDERLY PERSONS

This Appendix lists state statutes that specifically target elder abuse under the protective services statutes, civil statutes, and criminal statutes. It also covers general statutes concerning telemarketing and charity solicitation.

**SAMPLE STATE**

Protective Services Statutes: Most Protective Services Statutes are patterned after Older Americans Act of 1965, 42 U.S.C. § 3058i (1994). The guidelines required a response to reports of adult abuse including report investigation, determination of services needed to protect the person from further abuse, and reporting criminal acts to appropriate law enforcement agencies.

Term Used: Provides the term the state uses for elderly person is given and whether its definition is based on “age alone” or requires some impairment or infirmities. All ages given are minimum ages. “Impairments” or “infirmities,” as most states define them, are physical or mental conditions, including advancing age, that render the person incapable of either caring for themselves without assistance or protecting themselves without assistance.

Definitions

Physical and Emotional/Mental Abuse: Does not provide the entire definition, but only whether the act require resulting harm or whether the abusive act alone is sufficient. If the act alone is sufficient, the state can prosecute abusers even if the victim is unable to participate. Many definitions of physical and emotional abuse require a “caretaker” to be the perpetrator.

Caregiver/Caretaker: Most statutes define “caregiver” or “caretaker” broadly enough to include any person who is responsible for the care of the victim either through blood relationship, by contract, by court order, or even volunteers. Different definitions are noted.

Exploitation: Same as for “Physical and Emotional/Mental Abuse.” Most definitions of exploitation or financial abuse include any person as the perpetrator and include any action that improperly or

illegally uses the victim's person or money for the advantage or profit of another without the victim's consent.

Report Required: Indicates who has a duty to report and who may report abuse. Most statutes include a detailed list of those professionals and caretakers who "shall" report abuse if they have "reason to believe" it is occurring; failure to report is often a misdemeanor. If banks and financial institutions are included in the list, it is so noted. Most statutes also state that any person "may" report such abuse.

Crimes: Next, for those states that list criminal penalties for abuse under the protective services statutes, the crimes are listed.

Civil Law: Provides those civil statutes specifically directed at abuse of elderly persons are listed. All ages given are minimum ages.

Criminal Law: Some states list crimes against the elderly as separate statutes, while others add enhancements (extra fines or jail time) to the penalties listed in the standard statute. A few states have a general enhancement statute for all crimes. Where sentences for crimes are given, they are the maximum allowed unless otherwise specified. All ages given are minimum ages.

Telemarketing and Charitable Solicitation Statutes: Generally, statutes provide for civil penalties and some enhance penalties when victims are elderly. However, this Appendix shows whether the statutes are separate or included in other statutes and also whether they include criminal penalties for fraudulent acts against the customer. The statutes are often linked with deceptive trade practices statutes. All ages given are minimum ages.

**ALABAMA** (*Code of Alabama*)Protective Services: (ALA. CODE §§ 38-9-1 to 11 (1992 & Supp. 2002))

Term Used: “Adult in Need of Protective Services”—Age 18; plus impairment.

Definitions: (*Id.* § 38-9-2)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad definition

Exploitation: Act alone

Report Required: Listed persons “shall” (*Id.* § 38-9-8 (Supp. 1999))

Crimes: (*Id.* § 38-9-7)

1. Physical abuse: felony or misdemeanor
2. Mental abuse: misdemeanor
3. Exploitation: felony or misdemeanor

Civil Law: “Civil Action for Deceptive Sweepstakes Solicitations” (*Id.* §§ 8-19D-1 to 8-19D-2). Total damages up to three times compensatory damages.

Criminal Law:

Crimes: n/a

Enhancement: n/a

Telemarketing: “Alabama Telemarketing Act” (*Id.* §§ 8-19A-1 to 24)

[*Note:* This act is extensive]

Penalties: Criminal: Felony (*Id.* § 8-19A-21)

Charity Solicitation: “Unlawful Charitable Solicitation” (*Id.* §§ 13A-9-80 to 84)

Penalties: Criminal: Misdemeanor (*Id.* § 13A-9-82)

**ALASKA** (*Alaska Statutes*)

Protective Services: (ALASKA STAT. §§ 47.24.010 to 47.24.900 (Michie 2002))

Term Used: “Vulnerable Adult”—Age 18; plus impairment

Definitions: (*Id.* § 47.24.900)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad definition

Exploitation: Act alone

Report Required: Listed persons “shall”; others “may” (*Id.* § 47.24.010)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: n/a

Telemarketing: “Telephonic Solicitations” (*Id.* §§ 45.63.010–45.63.100)

Penalties: Criminal—Felony (*Id.* § 45.63.060)

Charity Solicitation: “Charitable Solicitations” (*Id.* §§ 45.68.010–45.68.900)

Penalties: Criminal—misdemeanor (*Id.* § 45.68.100)

**ARIZONA** (*Arizona Revised Statutes*)

Protective Services: (ARIZ. REV. STAT. §§ 46-451 to 56 (1997 & Supp. 2003))

Term Used: “Vulnerable Adult”—age 18; with infirmities (*Id.* § 46-451)

Definitions:

Physical/Mental abuse: Resulting harm required (*Id.* § 46-451)

Exploitation: Act alone (*Id.* § 46-456)

Report Required: Listed persons “shall” (includes person concerned with “the use or preservation of” property); others “may” (*Id.* § 46-454)

Crimes:

Exploitation—must be by person in position of trust and confidence (*Id.* § 46-456)

Civil Law:

1. Either victim or the state on behalf of the victim can bring the cause of action (*Id.* § 46-455). Remedies: compensatory and punitive damages, attorney fees. Seven-year statute of limitations
2. Damages for acts against elderly victims: treble damages awards (*Id.* § 46-456)

Criminal Law:

Crimes:

1. Theft by fiduciary (*Id.* § 13-1802)
2. Fraud (*Id.* § 13-2310)
3. Physical abuse requires actual harm or victim’s health to be “endangered” (*Id.* § 13-3623)
4. Emotional abuse only requires intentional or knowing act (*Id.* § 13-3623)
5. Penalties of 1–4: Felony offenses (*Id.* §§ 13-1802, 13-2310, 13-3623)

Enhancement: n/a

Telemarketing: “Telephone Solicitations” (*Id.* §§ 44-1271 to 79)

Penalties: Criminal—felony (*Id.* § 44-1277)

Charity Solicitation: “Solicitation of Funds for Charitable Purposes” (*Id.* §§ 44-6551 to 61)

Penalties: Criminal—felony; Civil (*Id.* § 44-6561)



**ARKANSAS** (*Arkansas Code Annotated*)

Protective Services: addressed under Criminal Code (ARK. CODE ANN. §§ 5-28-101 to 5-28-310 (Michie 1997 & Supp. 2003))

Term Used:

“Impaired adult”—age 18; plus impairment (*Id.* § 5-28-101)

Definitions: (*Id.* § 5-28-101)

Physical abuse: Resulting harm required

Caregiver: Broad definition

Emotional abuse: Act alone

Report Required: Listed persons “shall”; others “may” (*Id.* § 5-28-203)

Crimes: n/a

Civil Law:

Deceptive Trade Practices

Definition: “Elder person”: age alone: 60 (*Id.* § 4-88-201)

Additional penalty for deception against elder person: \$10,000 per violation, applied to state fund to fight such crimes.

Criminal Law: see Protective Services above

Crimes: n/a

Enhancement: n/a

Telemarketing: “Regulation of Telephonic Sellers” (*Id.* §§ 4-99-201 to 4-99-408)

Charity Solicitation: “Charitable Solicitation” (*Id.* §§ 4-103-201 to 05)

**CALIFORNIA** (*Annotated California Code*)

Protective Services (CAL. WELF. & INST. CODE §§ 15600–60 (West 2001 & Supp. 2003))

Term Used: “Elder”—Age alone: 65 (*Id.* § 15610.27)

Definitions:

Physical abuse: as per definitions of crimes (*Id.* § 15610.63)

Mental abuse: resulting harm required (*Id.* § 15610.53)

Caregiver: Care Custodian—official caregiver (*Id.* § 15610.17)

Exploitation: “Financial Abuse”—Any person—act alone (*Id.* § 15610.30)

Report Required: Listed persons “shall”; others “may” (*Id.* § 15630–31)

Crimes: (*Id.* § 15656); *Note*: Identical to CAL. PENAL CODE § 368 (West 1999 & Supp. 2003)

1. Physical abuse by any person: felony or misdemeanor
2. Theft or embezzlement by caretaker: felony

Civil Law: Plaintiff can receive attorney fees (CAL. WELF. & INST. CODE § 15657)

Criminal Law:

Crimes: (CAL. PENAL CODE § 368); *Note*: Identical to CAL. WELF. & INST. CODE § 15656

1. Definition of “elder”—age alone: 65.
2. Physical/mental abuse by any person: felony or misdemeanor
3. Theft or embezzlement by caretaker: felony

Enhancement:

1. General enhancement statute (CAL. PENAL CODE §§ 1170, 1170.85)

Law gives three possible sentences for each crime. Middle sentence is chosen unless circumstances dictate higher or lower sentence. (*Id.* § 1170)

A victim who is particularly vulnerable due to age and unable to defend himself is an aggravating circumstance allowing a higher sentence. (*Id.* § 1170.85)

2. Listing of specific crimes that carry sentence enhancement; includes corresponding codes for the crimes (*Id.* § 666.7)
  - a. Any specified offense against victim 65 yrs of age—add 1 year
  - b. Prior conviction of such—add 2 years
  - c. Result is great bodily injury—add 3 years
  - d. Result is death—add 5 yrs
  - e. Great bodily injury of victim 70 yrs of age—add 5 yrs
  - f. Death of victim 70 yrs of age—add 7 yrs
3. Special enhancement for crimes against the elderly (*Id.* § 667.9)
  - a. Court can add up to 7 years for the following crimes if the perpetrator is a repeat offender (*Id.* §§ 667, 667.9) and the victim is 65 or older:
    1. Robbery
    2. Kidnapping
    3. Sexual crimes
    4. Mayhem
    5. Carjacking
    6. Burglary

Telemarketing: “Telephonic Sellers” (CAL. BUS. & PROF. CODE § 17511.1 (West 1997 & Supp. 2003))

Charity Solicitation: “Charitable Solicitations” (*Id.* §§ 17510–17510.9)

Penalties: Criminal—misdemeanor (CAL. PENAL CODE § 532d)

**COLORADO** (*Colorado Revised Statutes*)Protective Services: (COLO. REV. STAT. §§ 26-3.1-101 to 06 (Supp. 1999))Term Used: “At risk adult”—Age 18; with impairments (*Id.* § 26-3.1-101)Definitions: (*Id.* § 26-3.1-101)

Physical/Mental abuse: “Mistreatment”—act alone

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Listed persons “should” (including financial institutions); others “may” (*Id.* § 26-3.1-102)

Crimes: n/a

Civil Law: n/aCriminal Law:Definition: “At risk adult”—Age alone: 60 (*Id.* § 18-6.5-102)

Crimes: n/a

Enhancement:

1. Enhanced penalties against certain crimes: criminal negligence; assault; robbery; theft; neglect; sexual assault; attempt, solicitation, or conspiracy in any of the above. (*Id.* § 18-6.5-103)
2. Mandatory sentencing for any crime against “at risk adult” (*Id.* § 16-11-309); *Note:* repealed Oct. 1, 2002)

Telemarketing:“Consumer Protection Act: Prevention of Telemarketing Fraud” (*Id.* §§ 6-1-301 to 05)Penalties: Criminal—misdemeanor (*Id.* § 6-1-305)Charity Solicitation: “Charitable Solicitations Act” (*Id.* §§ 6-16-101 to 13)Penalties: Criminal—felony/misdemeanor (*Id.* § 6-16-111)**CONNECTICUT** (*Connecticut General Statutes Annotated*)Protective Services: (CONN. GEN. STAT. ANN. §§ 17b-450 to 61 (West 1998))Term Used: “Elderly Person”—Age 60; with impairments (*Id.* § 17b-450)Definitions: (*Id.* § 17b-450)

Physical/Mental abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Listed persons “shall”; others “may” (*Id.* § 17b-451)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: Assault against victim 60 years of age brings enhanced penalty

Class B felony: 5 years of sentence given is not suspendable (CONN. GEN. STAT. ANN. § 53a-59a (West Supp. 1999))

Class D felony: 2 years of sentence given is not suspendable (*Id.* § 53a-60b)

Telemarketing: n/a

Charity Solicitation: “Solicitations of Charitable Funds Act” (CONN. GEN. STAT. ANN. 21a-175 to 90l (West 1994))

Penalties: Criminal—misdemeanor (*Id.* 21a-190l)

## **DELAWARE** (*Delaware Code Annotated*)

Protective Services: (DEL. CODE ANN. tit. 31, §§ 3901–13 (2001 & Supp. 2002))

Term Used: Infirm Adult—Age 18; with impairments (*Id.* § 3902)

Definitions: (*Id.* § 3902)

Physical abuse: Resulting harm required

Emotional abuse: Act alone

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Any person “shall” (*Id.* § 3910)

Crimes: Physical or emotional abuse or exploitation—misdemeanor/felony (*Id.* § 3913)

Civil Law: Prohibited Trade Practices Against Elder Person

1. “Elder Person”—age alone: 65 (DEL. CODE ANN. tit. 6, § 2580 (1999 & Supp. 2002))

2. Remedies: actual damages, attorney fees, restitution (*Id.* § 2583)

3. Extra fine beyond civil penalty up to \$10,000 for each act—to be paid into state fund (*Id.* § 2581)

Criminal Law:

Crimes: n/a

Enhancement:

1. For certain crimes against victims age 65, the sentence is raised to next level:

Intentional or reckless assault causing bodily injury (DEL. CODE ANN. tit. 11, § 612 (2001 & Supp. 2002))

Intentional or reckless assault causing serious bodily injury (*Id.* § 613)

Robbery (*Id.* § 832)

2. Theft against victims age 62

Sentence is enhanced and restitution required (*Id.* § 841)

Telemarketing: n/a

Charity Solicitation: “Prohibited Trade Practices: Charitable/Fraternal Solicitation” (DEL. CODE ANN. tit. 6, §§ 2591–98)

Penalties: Criminal—as per 2513 and/or 2581 (*Id.* § 2597)

**DISTRICT OF COLUMBIA** (*District of Columbia Code Annotated*)

Protective Services: (D.C. CODE ANN. §§ 7-1901 to 13 (2001 & Supp. 2002))

Term Used: “Adult in need of protective services”—Age 18; with impairments (*Id.* § 7-1901)

Definitions: (*Id.* § 7-1901)

Physical/Mental abuse: Act alone

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Listed persons “shall”; others “may” (*Id.* § 7-1903)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: If victim is 60 yrs of age, in addition to the standard penalty, add up to 1.5 times the fine or term in prison for the following crimes: robbery; attempted robbery; theft; attempted theft; extortion; fraud (*Id.* § 22-3601)

Telemarketing: n/a

Charity Solicitation: “Charitable Solicitations” (*Id.* §§ 44-1701 to 14)

Penalties: Criminal—misdemeanor (*Id.* § 44-1712)

**FLORIDA** (*Florida Statutes Annotated*)

Protective Services: (FLA. STAT. ANN. §§ 415.101–13 (West 1998 & Supp. 1999))

Term Used: “Vulnerable Person”—age 60; plus impairments (*Id.* § 415.102)

Definitions: (*Id.* § 415.102)

Physical abuse: Result, OR act alone, OR encouragement

Psychological abuse: Resulting injury required  
Caregiver: Broad Definition  
Exploitation: Act alone  
Report Required: Any person “shall”—specifically includes banks (*Id.* § 415.1034)  
Crimes: n/a

Civil Law:

Deceptive Trade Practices (*Id.* § 501.201)  
a. Violation Against Senior Citizens (age 60)—add \$15,000 additional penalty paid into state fund for each willful act (*Id.* § 501.2077)  
b. Restitution to victim (*Id.* § 501.2077)

Criminal Law:

Crimes:  
1. Assault/Battery against age 65, mandatory restitution (*Id.* § 784.08)  
2. Abuse, Neglect, Exploitation of Elderly Persons (*Id.* §§ 825.101–06)  
Definitions—see *id.* § 415.102 (*Id.* § 825.101)  
Abuse/Aggravated abuse—felonies (*Id.* § 825.102)  
Lewd/Lascivious Offenses—felonies (*Id.* § 825.1025)  
Exploitation—felonies (*Id.* § 825.103)  
3. Racketeering includes section 825 crimes (*Id.* § 895.02)  
Enhancement: If victim over age 65 (*Id.* §§ 775.082–89)  
1. “Aggravated abuse” of elderly person enacts “habitual violent felony offender” and “violent career criminal” enhancements (*Id.* § 775.084)  
2. Prisoners do not get “gain time” or “early release” (*Id.* § 775.087)  
3. Sentencing guidelines and offense levels—cross reference to §§ 784, 825. (*Id.* §§ 921.0012, 921.0022)

Telemarketing: “Florida Telemarketing Act” (*Id.* §§ 501.601–26)

Penalties: Criminal—felony (*Id.* § 501.623)

Charity Solicitation: “Solicitation of Contributions Act” (*Id.* §§ 496.401–26)

**GEORGIA** (*Official Code of Georgia*)

Protective Services: (GA. CODE ANN. §§ 30-5-1 to -8 (2003))

Term Used: “Elder Person”—Age alone: 65 (*Id.* § 30-5-3)

Definitions: (*Id.* § 30-5-3)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Listed persons “shall” (includes financial institutions); others “may” (*Id.* § 30-5-4)

Crimes: Abuse and exploitation are misdemeanors (*Id.* § 30-5-8)

Civil Law: Deceptive trade practices

1. “Elder person”: age 60 (*Id.* § 10-1-850)
2. Add up to \$10,000 each violation to go into state fund (*Id.* § 10-1-851)
3. Remedies: Actual and punitive damages, attorney fees, restitution (*Id.* § 10-1-853)

Criminal Law:

Crimes: n/a

Enhancement: If victim is age 65, penalties are increased for

1. Simple assault (*Id.* § 16-5-20)
2. Simple battery (*Id.* § 16-5-23)
3. Battery (*Id.* § 16-5-23.1)
4. Aggravated battery (*Id.* § 16-5-24)
5. Robbery (*Id.* § 16-8-40)
6. Theft greater than \$500 (*Id.* § 16-8-12)

Telemarketing: Deceptive Trade Practices: Criminal penalties (*Id.* § 10-1-393.5)

“Deceptive, Fraudulent, or Abusive Telemarketing” (*Id.* §§ 10-5B-1 to 8)

Penalties: Criminal—misdemeanor (*Id.* § 16-9-54)

“Telecommunications Marketing Act of 1998” (*Id.* §§ 46-5-180, 46-5-187)

Charity Solicitation: “Charitable Solicitations” (*Id.* § 43-17-12)

**HAWAII** (*Hawaii Revised Statutes Annotated*)

Protective Services: (HAW. REV. STAT. ANN. §§ 346-221 to 53 (Michie 1999))

Term Used: “Dependent Adult”—any adult; with impairments (*Id.* § 346-222)

Definitions: (*Id.* § 346-222)

Physical abuse: resulting harm required

Exploitation: Act alone

Report Required: Listed persons “shall”; others “may” (*Id.* § 346-224)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement:

1. No probation (*Id.* § 706-620)
2. Mandatory sentence without parole if victim age 60 for the following crimes: death; serious bodily injury, substantial bodily injury (*Id.* § 706-660.2)

Telemarketing: n/a

Charity Solicitation: Addressed under Professions and Occupations (*Id.* §§ 467B-1 to 13)

**IDAHO** (*Idaho Code*)

Protective Services: (IDAHO CODE §§ 39-5301 to 12 (Michie 2002))

Term Used: “Vulnerable Adult”: age 18; with impairments (*Id.* § 18-1505)

Definitions: (*Id.* § 39-5302)

Physical/Mental Abuse: resulting harm required

Caretaker: person responsible by family relationship, contract, or court order.

Exploitation: act alone

Report Required: Listed persons “shall”; others “may” (*Id.* § 39-5303)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: Abuse against vulnerable adult by any person which results in physical or mental injury or any act of exploitation is a misdemeanor (*Id.* § 18-1505)

Enhancement: n/a

Telemarketing: “Idaho Telephone Solicitation Act” (*Id.* §§ 48-1001 to 10)

Charity Solicitation: “Idaho Charitable Solicitation Act” (*Id.* §§ 48-1201 to 06)

**ILLINOIS** (*Illinois Compiled Statutes Annotated*)

Protective Services: (320 ILL. COMP. STAT. ANN. 20/2–13 (West 2001))

Term Used: “Eligible Adult”: Age alone: 60 (*Id.* at 20/2)

Definitions: (*Id.* at 20/2)

Physical/Mental Abuse: Resulting harm required

Exploitation: Act alone

Report Required: Anyone “may” (*Id.* at 20/4.2)

Crimes: n/a

Civil Law: (720 ILL. COMP. STAT. 5/16-1.3 (2003))

Term Used: “Elderly Person”: Age 60; plus impairments



Remedies: treble damages for value of property, plus attorney fees and court costs.

Criminal Law:

Crimes:

1. Aggravated Assault against victim age 60 (*Id.* at 5/12-2)  
Class A misdemeanor
2. Aggravated Battery against victim age 60 (*Id.* at 5/12-4)  
Class 3 felony
3. Financial Exploitation (*Id.* at 5/16-1.3)
  - a. Term used: “Elderly Person”: Age 60; plus impairments
  - b. “Perpetrator”: Person in position of trust as relative or fiduciary relationship
  - c. Intentional exploitation is a felony

Enhancement:

General Statute: enhanced sentences for crimes against victims age 60  
(730 ILL. COMP. STAT. ANN. 5/5-5-3.2 (West 1997 & Supp. 2003))

Telemarketing: “Telephone Solicitations Act” (815 ILL. COMP. STAT. ANN. 413/1–25 (West 1999 & Supp. 2003))

Charity Solicitation: “Solicitation for Charity Act” (225 ILL. COMP. STAT. ANN. 460/1–23 (West 1998 & Supp. 2003))

Penalties: Criminal—misdemeanor (*Id.* at 460/11)

Criminal—felony (*Id.* at 460/19)

**INDIANA** (*Annotated Indiana Code*)

Protective Services: (IND. CODE ANN. §§ 12-10-3-1 to 31 (Michie 2001))

Term Used: “Endangered Adult”—Age 18 plus impairments; plus abuse or threat of abuse (*Id.* § 12-10-3-2)

Definitions: (*Id.* § 12-10-3-2)

Abuse: Battery

Exploitation: Act alone

Report Required: Any person “shall” (*Id.* § 12-10-3-9)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes:

1. Exploitation of endangered adult—Class A misdemeanor  
(IND. CODE ANN. § 35-46-1-12 (Michie 1998))

2. Battery of endangered adult—Class D felony (*Id.* § 35-42-2-1)

Enhancement:

Victim age 65 is “aggravating circumstance” for enhanced penalty (*Id.* § 35-38-1-7.1)

Telemarketing: “Telephone Solicitations” State registration required (IND. CODE ANN. § 24-5-12-9 (Michie 1996))

Charity Solicitation: n/a

**IOWA** (*Iowa Code Annotated*)

Protective Services: (IOWA CODE ANN. §§ 235B.1–20 (West 2000 & Supp. 2003))

Term Used: “Dependent Adult”—Age 18; plus impairment (*Id.* § 235B.2)

Definitions: (*Id.* § 235B.2)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone (*Id.* § 235B.2)

Report Required: Listed persons “shall”; others “may” (*Id.* § 235B.3)

Crimes: (*Id.* § 235B.20)

Physical abuse by caretaker—felony or misdemeanor

Exploitation—felony or misdemeanor

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: n/a

Telemarketing: Addressed under Criminal Law “Consumer Frauds” (*Id.* § 714.16)

Charity Solicitation: n/a

**KANSAS** (*Kansas Statutes Annotated*)

Protective Services: (KAN. STAT. ANN. §§ 39-1430 to 42 (2000 & Supp. 2002))

Term Used: “Adult”—Age 18; plus impairments (*Id.* § 39-1430)

Definitions: (*Id.* § 39-1430)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone (*Id.* § 39-1430)

Report Required: Listed persons “shall”; others “may” (*Id.* § 39-1431)

Crimes: n/a

Civil Law: Court may impose an additional civil penalty of \$10,000 for any consumer protection violation against an “elder person” age

60 or more (*Id.* §§ 50-676 to 78)

Criminal Law:

Crimes:

Mistreatment of Dependent Adult (*Id.* § 21-3437)

- a. “Dependent Adult”—Age 18; plus impairments
- b. Physical injury—felony
- c. Exploitation—misdemeanor

Enhancement: n/a

Telemarketing: Addressed under “Consumer Protection” (*Id.* §§ 50-670 to 73)

Charity Solicitation: n/a

**KENTUCKY** (*Kentucky Revised Statutes Annotated*)

Protective Services: (KY. REV. STAT. ANN. §§ 209.005 to 209.160 (Banks-Baldwin 2001))

Term Used: “Adult”—age 18; plus impairments (*Id.* § 209.020)

Definitions: (*Id.* § 209.020)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: “Shall” report (*Id.* § 209.030)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: n/a

Telemarketing: Addressed under Consumer Protection (*Id.* §§ 367.46951–99)

Penalties: Criminal—felony/misdemeanor (*Id.* § 367.46999)

Charity Solicitation: n/a

**LOUISIANA** (*Louisiana Revised Statutes*)

Protective Services: addressed under Criminal Law (LA. REV. STAT. ANN. § 14:403.2 (West 1986 & Supp. 2003))

Term Used: “Adult”—Age alone: 60 (*Id.* § 14:403.2)

Definitions:

Physical/Mental Abuse: Resulting harm required (*Id.* § 14:403.2)

Exploitation: n/a

Report Required: n/a

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes:

1. Abuse and Neglect of Adults (*Id.* § 14:403.2)
  - a. “Adult”—age 60
  - b. Physical/Mental Abuse: Resulting harm required
  - c. Exploitation: Act alone
  - d. Report required of any person suspecting abuse
2. Aggravated rape of victim age 65: life in prison without parole (*Id.* § 14.42)
3. Cruelty to the infirm (*Id.* § 14:93.3)
  - a. Victim is “aged person”—age 60
  - b. By caregiver—broad definition
  - c. Sentence: 10 years/\$10,000
4. Exploitation of the infirm (*Id.* § 14:93.4)
  - a. Victim is “aged person”—age 60
  - b. By caregiver—broad definition
  - c. Sentence: 10 years/\$10,000

Enhancement:

1. If victim of the following crimes or attempts of such is age 65: (*Id.* § 14.50.1)
  - a. Crimes
    1. Manslaughter
    2. Rape
    3. Aggravated assault
    4. Battery
    5. Kidnapping
    6. False imprisonment
  - b. Enhancement: additional five years without parole
2. Aggravating Circumstances in Capital Sentencing (*Id.* § 905.4)  
Victim: age 65.

Telemarketing: “Consumer Telemarketing Protection Act of 1991” (*Id.* §§ 45:810–17)

Penalties: Criminal—fine/Imprisonment (*Id.* § 45.817)

Charity Solicitation: n/a

**MAINE** (*Maine Revised Statutes Annotated*)

Protective Services: (ME. REV. STAT. ANN. tit. 22, §§ 3470–87 (West 1992 & Supp. 2002))

Term Used: “Dependent Adult”—Age 18; plus impairments (*Id.* § 3472)

Definitions: (*Id.* § 3472)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Resulting harm required

Report Required: Listed professionals “shall” report (*Id.* § 3477)

Crimes: n/a

Civil Law: Violation of Protective Services (*Id.* § 3475)

Criminal Law:

Crimes: n/a

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: “Charitable Solicitations Act” (ME. REV. STAT. ANN. tit. 9, §§ 5001–16 (West 1997 & Supp. 2002))

Penalties: Criminal—“Class D crime” (*Id.* § 5014)

### **MARYLAND** (*Annotated Code of Maryland*)

Protective Services: (MD. CODE ANN., FAM. LAW §§ 14-101 to 04 (1999))

Term Used: “Vulnerable Adult”—adult; plus infirmities (*Id.* § 14-101)

Definitions: (*Id.* § 14-101)

Physical/Mental Abuse—Resulting harm required

Exploitation—Act alone

Report Required: Listed persons “shall”; others “may” (*Id.* § 14-302)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes:

Enhancement: Abuse—penalty in addition to others: misdemeanor/felony

(MD. ANN. CODE art. 27, § 35D (2003); *Note*: repealed Oct. 1, 2002)

Caregiver: Broad Definition

Telemarketing: n/a

Charity Solicitation: “Maryland Charitable Solicitations Act”

(MD. CODE ANN., BUS. REG. §§ 6-201 to 6-701 (1998 & Supp. 2003))

### **MASSACHUSETTS** (*Massachusetts General Laws Annotated*)

Protective Services: (MASS. GEN. LAWS ANN. ch. 19A, §§ 14–36 (West 2002))

Term Used: “Elderly Person”—Age alone: 60 (*Id.* § 14)

Definitions:

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Result—substantial loss required

Report Required: Listed persons “shall”; others “may” (*Id.* § 15)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: Sentences are longer dependant on status of victim

Assault/Battery: longer sentence if caretaker is perpetrator  
(MASS. GEN. LAWS ANN. ch. 265, §§ 13K, 15A, 18 (West 2000))

Robbery: possible life sentence if victim 60 years old or older (*Id.* § 19)

Abuse of patients in facilities: up to 2 years imprisonment or up to \$5000 fine (*Id.* § 38)

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: “Charitable Solicitation” (MASS. GEN. LAWS ANN. ch. 68, §§ 18–35 (West 2001))

Penalties: Criminal—fine/imprisonment (*Id.* § 32)

**MICHIGAN** (*Michigan Compiled Laws Annotated*)

Protective Services: (MICH. COMP. LAWS ANN. §§ 400.11–11f (West 1997))

Term Used: “Adult in need of protective services” or “Vulnerable person”—Age 18; plus infirmities (*Id.* § 400.11)

Definitions: (*Id.* § 400.11)

Physical/Mental Abuse: Resulting harm or threats

Exploitation: Act alone

Report Required: Listed persons “shall”; others “may” (*Id.* § 400.11a)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: Vulnerable Adult Abuse by Caregiver (*Id.* § 750.145n)

Term Used: “Vulnerable Adult”—Age 18; plus infirmities (*Id.* § 750.145m)

Definitions: (*Id.* § 750.145m)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: n/a

Penalties: Felony or misdemeanor offenses (*Id.* § 750.145n)

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: “Charitable Organizations and Solicitations Act” (*Id.* §§ 400.271–93 (West 1997))

Penalties: Criminal—misdemeanor (*Id.* § 400.293)

#### **MINNESOTA** (*Minnesota Statutes Annotated*)

Protective Services: Addressed under Criminal Law (MINN. STAT. ANN. §§ 626.557, 626.5571–72 (West 2003))

Civil Law: Penalties under consumer protection statute enhanced if victim is age 62—up to \$10,000 additional penalty (*Id.* § 325F.71)

Criminal Law:

Term used: “Vulnerable Adult”—Age 18; plus infirmities (*Id.* §§ 609.232, 626.5572)

Definitions:

Physical/Mental Abuse: Act alone (*Id.* §§ 609.2325, 626.5572)

Caregiver: Broad Definition (*Id.* §§ 609.232, 626.5572)

Exploitation: Act alone (*Id.* § 609.2335)

Report Required: Listed persons “shall”; others “may” (*Id.* §§ 626.557, 626.5572)

Crimes: Criminal abuse by caregiver—felony (*Id.* § 609.2325)

Deceptive trade practices—gross misdemeanor (*Id.* § 609.2336)

Enhancement: n/a

Telemarketing: Addressed under Consumer Protection (*Id.* § 325G)

Charity Solicitation: Addressed under Criminal Law: deceptive trade practices—see above

#### **MISSISSIPPI** (*Mississippi Code Annotated*)

Protective Services: (MISS. CODE ANN. §§ 43-47-1 to 37 (2000 & Supp. 2003))

Term Used: “Vulnerable Adult”—Age 18; plus infirmities (*Id.* § 43-47-5)

Definitions: (*Id.* § 43-47-5)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Any person “shall” (*Id.* § 43-47-7)

Crimes: Acts alone

Acts that contribute or tend to contribute to abuse, neglect or exploitation of any vulnerable adult—misdemeanor/felony (*Id.* § 43-47-19)

Civil Law: n/a

Criminal Law: n/a

Crimes: n/a—under Protective Services

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: “Regulation of Charitable Solicitations” (*Id.* §§ 79-11-501 to 29)

Penalties: Criminal—misdemeanor (*Id.* § 79-11-529)

**MISSOURI** (*Annotated Missouri Statutes*)

Protective Services: (MO. ANN. STAT. §§ 660.250–.320 (West 2000))

Term used: “Eligible Adult”—Age alone: 60 (*Id.* § 660.250)

Definitions:

Physical/Mental Abuse: Resulting harm required (*Id.* § 660.250)

Exploitation: n/a

Report Required: Listed persons “shall”; others “may” (*Id.* § 660.300)

Crimes: Abuse—felony (*Id.* § 600.250)

Civil Law: n/a

Criminal Law:

Crimes: Elder abuse—age 60 (*Id.* §§ 565.180, 565.182, 565.184)

Penalties: felony/misdemeanor

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: “Charitable Organizations and Solicitations Law” (*Id.* §§ 407.450–78)

**MONTANA** (*Montana Code Annotated*)

Protective Services: (MONT. CODE ANN. §§ 52-3-800 to 25 (2001))

Term Used: “Older Person”—Age alone: 60 (*Id.* § 52-3-803)

Definitions:

Physical/Mental Abuse: Resulting harm required (*Id.* § 52-3-803)

Exploitation: Act alone (*Id.* § 52-3-803)

Report Required: Listed persons “shall”; others “may” (*Id.* § 52-3-811)

Crimes: If older person also has infirmities, abuse or exploitation is misdemeanor/felony (*Id.* § 52-3-825)

Civil Law: n/a



Criminal Law: n/a

Crimes: n/a—under Protective Services

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: n/a

**NEBRASKA** (*Revised Statutes of Nebraska*)

Protective Services: (NEB. REV. STAT. §§ 28-348 to 87 (1995 & Supp. 2002))

Term Used: “Vulnerable Adult”—Age 18; plus impairments (*Id.* § 28-371)

Definitions:

Physical/Mental Abuse: Resulting harm required (*Id.* § 28-351)

Caregiver: Broad Definition (*Id.* § 28-353)

Exploitation: Resulting loss required (*Id.* § 28-358)

Report Required: Listed persons “shall”; others “may” (*Id.* § 28-372)

Crimes: Knowing and Intentional Abuse—felony (*Id.* § 28-386)

Civil Law: n/a

Criminal Law:

Crimes: n/a—under Protective Services

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: n/a

**NEVADA** (*Nevada Revised Statutes*)

Protective Services: (NEV. REV. STAT. §§ 200.5091–200.750 (2001 & Supp. 2001))—Listed under Criminal Law

Civil Law:

Deceptive Trade Practices

Term Used: “Elderly Person”—Age alone: 65 (*Id.* § 598.0933)  
Actual and punitive damages plus attorney fees (*Id.* § 598.0977)

Additional penalty: \$10,000 to be added to state fund (*Id.* § 598.0973)

Cause of Action for Abuse (*Id.* § 41.1395)

Term Used: “Older Person”—age alone: 60

Definitions:

Physical/Mental Abuse: Resulting harm required  
Exploitation: Act alone by person in position of trust  
and confidence

Penalties: Double damages

Attorney Fees and Costs: Court can award if find  
recklessness, fraud or malice

Cause of action if perpetrator motivated by characteristics of  
victim (*Id.* § 41.690)

Actual and punitive damages plus attorney fees

Criminal Law:

Crimes: (*Id.* §§ 200.5091–55)

Term Used: “Older Person”—age alone: 60 (*Id.* § 200.5092)

Definitions: (*Id.* § 200.5092)

Physical/Mental Abuse: Resulting harm required

Exploitation: Act alone by person in position of trust  
and confidence

Penalties: Abuse—felony (*Id.* § 200.5099)

Exploitation—felony/gross misdemeanor (*Id.* § 200.5099)

Report Required: Listed persons “shall”; others “may” (*Id.* §  
200.5093)

Protective Services Provided (*Id.* § 200.5098)

Enhancement: (*Id.* § 193.167)

Double the sentence for the following crimes if victim age  
65 or older

Assault/Battery

Kidnapping

Robbery

Embezzlement/False Pretenses if amount is \$250 or more

Telemarketing: n/a

Charity Solicitation: “Solicitation by Telephone” (*Id.* §§ 599B.005–  
599B.300)

Additional penalty if against elderly person—age 65 (*Id.* §§  
599B.270, 599B.280)

**NEW HAMPSHIRE** (*New Hampshire Revised Statutes Annotated*)

Protective Services: (N.H. REV. STAT. ANN. §§ 161-F:43–57 (Supp.  
2002))

Term Used: “Adult”—Age 18; plus impairments (*Id.* § 161-F:43)

Definitions: (*Id.* § 161-F:43)

Physical/Mental Abuse: Act alone

Exploitation: Act alone

Report Required: Listed persons “shall” (*Id.* § 161-F:46)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: Addressed under “Attorneys general, Director of Charitable Trusts” (*Id.* §§ 7:19–32a)

Unlawful Acts (*Id.* § 7:28f)

**NEW JERSEY** (*New Jersey Statutes Annotated*)

Protective Services: (N.J. STAT. ANN. §§ 52:27D-406 to 25 (West 2001 & Supp. 2003))

Term Used: “Vulnerable Adult”—Age 18; plus infirmities (*Id.* § 52:27D-407)

Definitions: (*Id.* § 52:27D-407)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: A person “may” (*Id.* § 52:27D-409)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: If perpetrator knew or should have known victim was age 60 or older (*Id.* § 2C:44-1)

Telemarketing: n/a

Charity Solicitation: “Charitable Fund Raising” (N.J. STAT. ANN. §§ 45:17A-18 to 40 (West 1995 & Supp. 2003))

**NEW MEXICO** (*New Mexico Statutes Annotated*)

Protective Services: (N.M. STAT. ANN. §§ 27-7-14 to 31 (Michie 2000 & Supp. 2001))

Term Used: “Incapacitated Adult”—Age 18; plus impairment (*Id.* § 27-7-16)

Definitions: (*Id.* § 27-7-16)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Any persons “shall” (*Id.* § 27-7-30)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: If victim is age 60 or more: sentence increase of 1 year for physical injury and 2 years for great bodily harm (*Id.* § 31-18-16.1)

Telemarketing: “Fraudulent Telemarketing Act” (*Id.* §§ 30-50-1 to 4)

Charity Solicitation: “Charitable Solicitations Act” (*Id.* §§ 57-22-1 to 11)

**NEW YORK** (*Consolidated Laws of New York Annotated*)

Protective Services: (N.Y. SOC. SERV. LAW § 473-a to 473-c (McKinney 2003))

Term Used: “Elderly Person”—Age alone: 60 (N.Y. EXEC. LAW § 541 (McKinney 1996 & Supp. 2003))

Definitions: (N.Y. SOC. SERV. LAW § 473-a)

Physical/Mental Abuse: Resulting harm required

Exploitation: Act alone

Report Required: n/a

Crimes: n/a

Triad Program: (N.Y. EXEC. LAW § 844-b)

Civil Law: Additional civil penalty for fraud against victim age 65: Up to \$10,000 into state fund

(N.Y. GEN. BUS. LAW § 349-c (McKinney Supp. 2003))

Criminal Law:

Crimes: (N.Y. PENAL LAW §§ 260.30–34 (McKinney 2000 & Supp. 2003))

Definition of “elder”: age 60; plus infirmities (*Id.* § 260.30)

Physical abuse—felony (*Id.* § 260.32–34)

Enhancement: n/a

Telemarketing: “Telephone Sales Protection Act” (N.Y. PERS. PROP. LAW § 441 (McKinney Supp. 2003))

Charity Solicitation: “Solicitation and Collection of Funds for Charitable Purposes”

(N.Y. EXEC. LAW § 172-d)

**NORTH CAROLINA** (*General Statutes of North Carolina*)

Protective Services: (N.C. GEN. STAT. §§ 108A-99 to 108A-111 (2002))

Term Used: “Disabled Adult”—Age 18; plus infirmities (*Id.* § 108A-101)

Definitions: (*Id.* § 108A-101)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Any person “shall” (*Id.* § 108A-102)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes:

Term used: “Elder”—Age 60; plus infirmities (*Id.* § 14-32.3)

Abuse by caretaker with resulting physical/mental injury—felony (*Id.* § 14-32.3)

Exploitation—felony/misdemeanor (*Id.* § 14-32.3)

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: “Solicitation of Contributions” (*Id.* §§ 131F-1 to 33). Also addressed under Criminal Law (*Id.* § 14-401.12) and Commerce and Business (*Id.* § 66-260)

Penalties: Criminal—misdemeanor (*Id.* 14-401.12)

**NORTH DAKOTA** (*North Dakota Century Code Annotated*)

Protective Services: (N.D. CENT. CODE §§ 50-25.2-01 to 14 (1999 & Supp. 2003))

Term Used: “Vulnerable Adult”—Adult with substantial impairment (*Id.* § 50-25.2-01)

Definitions: (*Id.* § 50-25.2-01)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Persons “may” (*Id.* § 50-25.2-03)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: Exploitation of vulnerable adult by one in position of trust or business relationship or one who knows the victim lacks capacity to consent—felony (*Id.* § 12.1-31-07.1)

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: “Charitable Organizations Soliciting Contributions” (*Id.* §§ 50-22-01 to 05)

**OHIO** (*Baldwin's Ohio Revised Code*)

Protective Services: (OHIO REV. CODE ANN. §§ 5101.60 to 72 (West 2001))

Term Used: “Adult”—Age 60; plus infirmities (*Id.* § 5101.60)

Definitions: (*Id.* § 5101.60)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Listed persons “shall”; others “may” (*Id.* § 5101.61)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement:

- 1) When imposing penalties for misdemeanor crimes, if victim is over age 65, the court should consider restitution (*Id.* § 2929.21)
- 2) When imposing sentences for misdemeanor crimes, if victim is over age 65, the court should favor imposing imprisonment (*Id.* § 2929.22)

Telemarketing: “Telephone Solicitors” (*Id.* §§ 4719.01–18)

Charity Solicitation: Addressed under “Charitable Organizations” (*Id.* §§ 1716.01–99)

Penalties: Criminal—felony (*Id.* § 1716.99)

**OKLAHOMA** (*Oklahoma Statutes Annotated*)

Protective Services: (OKLA. STAT. ANN. tit. 43A, §§ 10-101 to 11 (West 2001 & Supp. 2003))

Term Used: “Vulnerable Adult”—Substantial impairment required (*Id.* § 10-103)

Definitions: (*Id.* § 10-103)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Any person “shall,” but also lists persons required to report (*Id.* §10-104)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: Abuse under title 43, section10-103 is a felony (OKLA. STAT. ANN. tit. 21, § 843.1 (West 2002))

Enhancement: “Elderly and Incapacitated Victim’s Protection Program”

(OKLA. STAT. tit. 22, § 991a-13 to 20 (Supp. 2003))

Term used: “Elderly Person”—Age alone: 62 (*Id.* § 991a-15)

Offenses included: Assault/battery; burglary; grand larceny; extortion; fraud; embezzlement (*Id.* § 991a-16)

Enhancement of Sentence: (*Id.* § 991a-17)

Mandatory confinement—30 days

Restitution/Community service

In addition to other sentence

Restitution: Can seize property of criminal to pay restitution (*Id.* § 991a-19)

Repeat Offenders: (*Id.* § 991a-20)

Telemarketing: Addressed under Consumer Protection (OKLA. STAT. ANN. tit. 15, §§ 775A.1–5 (West Supp. 2003)) and Criminal law (OKLA. STAT. ANN. tit. 21, § 1861)

Penalties: Criminal—Misdemeanor (*Id.* § 1861)

Charity Solicitation: “Oklahoma Solicitation of Charitable Contributions Act (1959)” (OKLA. STAT. ANN. tit. 18, §§ 552.02–18 (West 1998 & Supp. 2003))

Penalties: Criminal—fine/imprisonment (*Id.* § 552.18);

See also *id.* § 553.3 and OKLA. STAT. ANN. tit. 21, § 1861

## **OREGON** (*Oregon Revised Statutes*)

Protective Services: (OR. REV. STAT. §§ 124.005–124.140 (2001))

Term Used: “Elderly Person”—age alone: 65 (*Id.* § 124.005)

Definitions: (*Id.* § 124.005)

Physical/Mental Abuse: Resulting harm required; *Note*: words that cause significant emotional harm are included

Abuser need not be a caregiver; can be any person

Exploitation: “Fiduciary Abuse”—act alone (*Id.* § 124.110)

Report Required: Listed persons “shall”—includes “any public or private official while acting in an official capacity” (*Id.* § 124.060)

Elderly person must bring petition for relief (*Id.* § 124.010)

Crimes: n/a

Civil Law: Cause of Action for physical or fiduciary abuse (*Id.* § 124.100)

Relief: Economic and noneconomic damages; attorney fees; guardian fees

Criminal Law:

Crimes: “Criminal Mistreatment in First Degree”—felony (*Id.* § 163.205)

Caregiver who causes physical or financial injury or fraud

Enhancement: n/a

Telemarketing: Addressed under “Crimes” (*Id.* § 165.555) and “Trade Regulations” (*Id.* § 646.563)

Charity Solicitation: “Charitable Solicitations Act” (*Id.* §§ 128.801–98)

Penalty: Criminal—misdemeanor (*Id.* § 165.555)

**PENNSYLVANIA** (*Pennsylvania Statutes Annotated*)

Protective Services: (PA. STAT. ANN. tit. 35, §§ 10225.101–03, 10225.301–12 (West 2003))

Term Used: “Older Adult”—Age alone: 60 (*Id.* § 10225.103)

Definitions: (*Id.* § 10225.103)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Any person “may” (*Id.* § 10225.302)

Crimes:

Civil Law: Addressed in Deceptive Trade Practices (PA. STAT. ANN. tit. 73, § 201.8 (West Supp. 2003))

Criminal Law:

Crimes: n/a

Enhancement: (PA. STAT. ANN. tit. 42, § 9717 (West 1998))

Term used: “Elderly Person”—Age alone: 60

Mandatory Imprisonment terms for aggravated assault, rape, and theft by deception

Telemarketing: “Telemarketer Registration Act” (PA. STAT. ANN. tit. 73, §§ 2242–49)

Charity Solicitation: “Solicitation of Funds for Charitable Purposes Act” (PA. STAT. ANN. tit. 10, §§ 162.2–.18 (West 1999 and Supp. 2003))

Penalties: Criminal—misdemeanor (*Id.* § 162.18)

**RHODE ISLAND** (*General Laws of Rhode Island*)

Protective Services: (R.I. GEN. LAWS §§ 42-66-1 to 17 (1998 & Supp. 2002))

Term Used: “Elderly Persons”—Age alone: 60 (*Id.* § 42-66-8)

Definitions: (*Id.* § 42-66-4.1)

Physical/Mental Abuse: Resulting harm required

Abuser can be any person with a duty of care to the victim

Exploitation: Resulting harm required



Report Required: Any person “shall” (*Id.* § 42-66-8)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: For crimes against victims age 60

Assault (*Id.* § 11-5-10); also (*Id.* § 11-5-10.4)

Restitution (*Id.* § 11-5-10.1)

Burglary when person age 60 is on the premises (*Id.* § 11-8-2.3)

Robbery (*Id.* § 11-39-1)

Larceny (*Id.* § 11-41-5); *Note*: enhancement for victims 65 years or older)

Telemarketing: “Telephone Sales Solicitation Act” (*Id.* §§ 5-61-1 to 6)

Penalties: Criminal—Fine/imprisonment (*Id.* § 5-61-5)

Charity Solicitation: Solicitation by Charitable Organizations (*Id.* §§ 5-53.1-1 to 18)

Penalties: Criminal—misdemeanor (*Id.* § 5-53.1-15)

**SOUTH CAROLINA** (*Code of Laws of South Carolina*)

Protective Services: (S.C. CODE ANN. §§ 43-35-5 to 90 (Law. Co-op. Supp. 2002))

Term Used: “Vulnerable Adult”—Age 18; plus infirmities (*Id.* § 43-35-10)

Definitions: (*Id.* § 43-35-10)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Resulting harm required

Report Required: Listed persons “shall”; others “may” (*Id.* § 43-35-25)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: n/a

Telemarketing: Addressed under “Crimes” (S.C. CODE ANN. § 16-17-445 (Law. Co-op. 2003))

Charity Solicitation: “Solicitation of Charitable Funds” (S.C. CODE ANN. §§ 33-56-10 to 33-56-200 (Law. Co-op. Supp. 2002))

Penalties: Criminal—misdemeanor (*Id.* § 33-56-145)

**SOUTH DAKOTA** (*South Dakota Codified Laws*)

Protective Services: Listed under Criminal Law (S.D. CODIFIED LAWS §§ 22-46-1 to 6 (Michie 1998))

Civil Law: n/a

Criminal Law:

Crimes:

Term Used: “Disabled Adult”—Age 18; plus infirmities (*Id.* § 22-46-1)

Definitions:

Physical Abuse: Act alone (*Id.* § 22-46-1)

Exploitation: Act alone—by a caretaker (*Id.* § 22-46-3)

Penalties: felonies (*Id.* §§ 22-46-2 to 3)

Enhancement: n/a

Telemarketing: Addressed under Trade Regulation “Telemarketing” (S.D. CODIFIED LAWS §§ 37-30A-1 to 17 (Michie 2003))

Charity Solicitation: “Telephone Solicitation” (*Id.* §§ 37-30-1 to 29)

Penalties: Criminal—misdemeanor (*Id.* § 37-30-17)

**TENNESSEE** (*Tennessee Code Annotated*)

Protective Services: (TENN. CODE ANN. §§ 71-6-101 to 19 (1995 & Supp. 2003))

Term Used: “Adult”—Age 18; plus impairments (*Id.* § 71-6-102)

Definitions: (*Id.* § 71-6-102)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Any person “shall” (*Id.* § 71-6-103)

Crimes: Willful abuse/exploitation—Misdemeanor (*Id.* § 71-6-117)

Willful physical abuse resulting in serious bodily or mental harm—felony (*Id.* § 71-6-119)

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: Factor in enhancement—victim “vulnerable due to age” (TENN. CODE ANN. § 40-35-114 (Supp. 2002))

Telemarketing: “Consumer Telemarketing Protection Act of 1990” (TENN. CODE ANN. §§ 47-18-1501 to 27 (2001))

Penalties: Criminal—misdemeanor (TENN. CODE ANN. § 47-18-1526 (2001))

Charity Solicitation: “Solicitation of Charitable Funds” (TENN. CODE ANN. §§ 48-101-501 to 21 (2002 & Supp. 2003))

Penalties: Criminal—misdemeanor/felony (*Id.* § 48-101-515)

**TEXAS** (*Texas Codes Annotated*)

Protective Services: (TEX. HUM. RES. CODE ANN. §§ 48.001–48.357 (Vernon 2001 & Supp. 2003))

Term Used: “Elderly Person”—Age alone: 65 (*Id.* § 48.002)

Definitions: (*Id.* § 48.002)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition—requires ongoing relationship with the victim

Exploitation: Act alone

Report Required: Any person “shall” (*Id.* § 48.051)

Crimes: n/a

Rights of the Elderly: (*Id.* §§ 102.001–102.105)

Term used: “Elderly Individual”—Age alone: 60 (*Id.* § 102.001)

Civil Law: n/a

Criminal Law:

Crimes: Physical or mental injury to elderly person—felony (TEX. PENAL CODE ANN. § 22.04 (Vernon 2003))

Enhancement: If victim is 65:

Assault (*Id.* § 22.01(c))

Robbery (*Id.* § 29.03)

Telemarketing: “Telephone Solicitation” (TEX. BUS. & COM. CODE ANN. 37.01–05 (Vernon 2002))

Penalties: Criminal—misdemeanor (TEX. PENAL CODE ANN. § 38.251)

Charity Solicitation: “Telephone Solicitations by Charitable Organizations” (TEX. OCC. CODE ANN. art. 9023e (Vernon Supp. 2003))

**UTAH** (*Utah Code Annotated*)

Protective Services: (UTAH CODE ANN. §§ 62A-3-301 to 12 (2000 & Supp. 2003))

Term Used: “Elder Adult”—Age alone: 65 (*Id.* § 62A-3-301)

Definitions: (*Id.* § 62A-3-301)

Physical Abuse: Act alone

Emotional Abuse: Resulting harm required

Caretaker: person responsible by family relationship, contract, or court order.

Exploitation: Act alone

Report Required: Any person “shall” (*Id.* § 62A-3-302)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: Physical injury—felony/misdemeanor (*Id.* § 76-5-111.1)  
Exploitation of an elder adult by one in position of trust or  
business relationship or one who knows the victim lacks  
capacity to consent—felony  
Report Required: Any person “shall” (*Id.* § 76-5-111.1)  
Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: n/a

**VERMONT** (*Vermont Statutes Annotated*)

Protective Services: (VT. STAT. ANN. tit. 33, §§ 6901–41 (2001 & Supp. 2003))

Term Used: “Vulnerable Adult”—Age 18 plus infirmities (*Id.* § 6902)

Definitions: (*Id.* § 6902)

Physical Abuse: Act alone

Emotional Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Listed persons “shall”; others “may” (*Id.* § 6903)

Crimes: Penalty—fine/imprisonment (*Id.* § 6913)

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: Addressed under Consumer Fraud—“Charitable Solicitations”

(VT. STAT. ANN. tit. 9, § 2479 (Supp. 2003))

**VIRGINIA** (*Code of Virginia Annotated*)

Protective Services: (VA. CODE ANN. §§ 63.2-1603 to 10 (Michie 2002))

Term Used: “Adult”—Age 18 plus infirmities (*Id.* § 63.2-1603)

Definitions: (*Id.* § 63.2-1603)

Physical/Mental Abuse: not defined

Exploitation: n/a

Report Required: Listed persons “shall”; others “may” (*Id.* § 63.2-1606)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: n/a

Telemarketing: “Prizes & Gifts Act” (VA. CODE ANN. §§ 59.1-415 to 23 (Michie 2001))

Charity Solicitation: “Solicitation of Contributions” (VA. CODE ANN. §§ 57-48 to 69 (Michie 2003))

Penalties: Criminal—misdemeanor (*Id.* § 57-59)

**WASHINGTON** (*Revised Code of Washington Annotated*)

Protective Services: (WASH. REV. CODE ANN. §§ 74.34.005–.901 (West 2001 & Supp. 2003))

Term used: “Vulnerable Adult”—Age 60; plus infirmities (*Id.* § 74.34.020)

Definitions: (*Id.* § 74.34.020)

Physical/Mental Abuse: Resulting harm required

Abuser can be any individual

Exploitation: Act alone

Report Required: “Mandated reporters” shall; “permissive reporters” may (*Id.* § 74.34.035)

“Permissive reporters” includes financial institutions

See § 74.34.020 for definitions

Crimes: n/a

Civil Law: Cause of action for abuse/exploitation if resides in a facility or is cared for at home by a licensed agency—actual damages, attorney fees, and cost of suit (*Id.* § 74.34.200)

Criminal Law:

Crimes: n/a

Enhancement: n/a

Telemarketing: “Commercial Telephone Solicitation” (WASH. REV. CODE ANN. §§ 19.158.010–.901 (West 1999 & Supp. 2003))

Penalties: Criminal—felony/misdemeanor (*Id.* § 19.158.160)

Charity Solicitation: “Charitable Solicitations” (*Id.* §§ 19.09.010–.915)

Penalties: Criminal—misdemeanor/gross misdemeanor (*Id.* § 19.09.275)

**WEST VIRGINIA** (*West Virginia Code Annotated*)

Protective Services: (W. VA. CODE ANN. §§ 9-6-1 to 15 (Michie 1998 & Supp. 2003))

Term used: “Incapacitated Adult”—Any age; plus infirmities (*Id.* § 9-6-1)

Definitions: (*Id.* § 9-6-1)

Physical/Mental Abuse: Act alone—includes threats

Exploitation: n/a  
 Report Required: Listed persons “shall”; others “may” (*Id.* § 9-6-9)  
 Crimes: n/a

Civil Law: n/a

Criminal Law:  
 Crimes: n/a  
 Enhancement: (W. VA. CODE § 61-2-10a (2000))  
 Term used: “Elderly”—Age alone: 65  
 Crimes: Assault/batter: assault during commission of felony  
 Penalty: Sentence is mandatory—no subject to suspension or probation

Telemarketing: Addressed under “Consumer Credit and Protection Act—Telemarketing”  
 (W. VA. CODE ANN. §§ 46A-6F-102 to -703 (Michie 1999))  
 Penalties: Criminal—felony for claiming to offer criminal recovery service—(*Id.* § 46A-6F-503)

Charity Solicitation: “Solicitation of Charitable Funds Act” (W. VA. CODE ANN. §§ 29-19-1 to 16 (Michie 2001 & Supp. 2003))  
 Penalties: Criminal—misdemeanor (*Id.* §§ 29-19-15)

**WISCONSIN** (*Wisconsin Statutes Annotated*)

Protective Services: (WIS. STAT. ANN. §§ 55.001–07 (West 2003); *see also id.* § 46.90)  
 Term Used: “Vulnerable Adult”—Age 18; plus infirmities (*Id.* § 55.01)  
 Definitions: (*Id.* § 55.01)  
     Physical/Mental Abuse: Resulting harm required  
     Caregiver: Broad Definition  
     Exploitation: “Misappropriation of property”—act alone  
 Report Required: Any person “may” (*Id.* § 46.90)  
 Crimes: n/a

Civil Law: Trade practices—if victim is “elderly person” (age 62), extra fine of \$10,000 to go into state fund, plus restitution (*Id.* § 100.264)

Criminal Law:  
 Crimes: Abuse of Vulnerable Adults (*Id.* § 940.285)  
 Term used: “Vulnerable Adult”—Age 18; plus infirmities  
 “Maltreatment”—act alone  
 Penalties—felony/misdemeanor  
 Enhancement:  
 Term used: “Elder Person”—Age alone: 62 (each statute)  
 Crimes  
     Battery (*Id.* § 940.19)

Violent felony (*Id.* § 939.647)

Sexual Assault (*Id.* § 940.225)

Reckless Injury (*Id.* § 940.23)

Stalking (*Id.* § 940.32)

Telemarketing: Addressed under Trade Regulations (*Id.* § 34.72) and  
Consumer Transactions (*Id.* §§ 423.101–.402)

Charity Solicitation: “Solicitation of Funds for Charitable Purposes” (*Id.*  
§§ 440.41–48)

**WYOMING** (*Wyoming Statutes Annotated*)

Protective Services: (WYO. STAT. ANN. §§ 35-20-101 to 09 (Michie 2003))

Term Used: “Vulnerable Adult”—Age 18; plus infirmities (*Id.* §  
35-20-102)

Definitions: (*Id.* § 35-20-102)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Any person “shall” (*Id.* § 35-20-103)

Crimes: Abuse—misdemeanor (*Id.* § 35-20-109; *Note*: repealed 2002)

Exploitation—fine/imprisonment

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: n/a

Telemarketing: Addressed under Consumer Protection (*Id.* §§ 40-12-101  
to -404)

Charity Solicitation: n/a

